

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 316.

THE UNITED STATES OF AMERICA, PLAINTIFF IN
ERROR,

vs.

NEW RIVER COLLIERIES COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

Filed

FILED MARCH 9, 1923.

(28797)

SUPREME COURT OF THE UNITED STATES.

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FOR THE ~~SECOND~~ CIRCUIT.

Third

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1 United States District Court, District of New Jersey.

NEW RIVER COLLIERIES COMPANY,	} At law. No. 2756.
vs.	
UNITED STATES OF AMERICA.	

Docket Entries.

Nov. 19, 1920.	Summons issued.
" 29, "	Summons and complaint returned, served Nov. 29 & filed.
Dec. 3, "	Appearance for defendant, filed.
Jan. 8, 1921.	Answer, filed.
" 24, "	Affidavit & notice of motion to strike out answer and for entry of summary judgment, filed.
" " "	Hearing on motion to strike out answer & amended answer to be filed.
Feby. 7, "	Rule continuing hearing, filed.
" 19, "	Rule dismissing motion, filed.
" " "	Amended answer, filed.
" 24, "	Reply, filed.
Mar. 7, "	Notice of motion to set date for trial, filed.
" " "	Order fixing date for trial, filed.
" 24, "	Requisition for witnesses, filed.
" " "	Subpoenas duces tecum, issued (2).
" " "	Requisition for witnesses, filed.
" " "	Subpoenas ad test issued (2).
" " "	Subpoenas.
" 29, "	Trial.
" 30, "	"

2 Mar. 31, 1921. Trial. Verdict for plaintiff.

Apr. 15, " Rule for judgment final for plaintiff for \$213,100.11, filed.

Apr. 15, 1921.	Recording judgment.
" " "	Rule denying application for new trial, filed.
" 16, "	Affidavit of costs, filed.
May 25, "	Bill of exceptions, filed.
" " "	Assignments of error, filed (U. S. Circuit Court of Appeals).
" " "	Petition for writ of error, filed.
" " "	Order allowing writ of error, filed.
" " "	Writ of error issued. Copy filed.
" " "	Citation issued.
June 7, "	Citation returned, service acknowledged. Copy filed.
" " "	Citation returned, service acknowledged. Copy filed.

3 United States District Court, District of New Jersey.

THE NEW RIVER COLLIERIES COMPANY,
vs.
 UNITED STATES OF AMERICA. } At law. No. 2836.

Docket Entries.

Dec. 30, 1920. Summons issued.
 Jan. 11, 1921. Summons and complaint returned, service acknowl-
 edged Jan. 10 and filed.
 " " " Appearance for defendant, filed.
 Feby. 19, " Answer, filed.
 Mar. 7, " Affidavit and notice of motion to strike out answer,
 filed.
 " " " Order continuing hearing, filed.
 " 30, " Reply, filed.
 " 29, " Trial.
 " 30, " "
 " 31, " " verdict for plaintiff.
 Apr. 15, " Rule denying application for new trial, filed.
 " " " Rule for judgment final for plaintiff for \$19,700.91,
 filed.
 " " " Recording judgment.
 May 25, " Bill of exceptions, filed.
 " " " Assignments of error, filed. (U. S. Circuit Court
 of Appeals.)
 May 25, 1921. Petition for writ of error, filed.
 " " " Order allowing writ of error, filed.
 " " " Writ of error issued. Copy filed.
 " " " Citation issued.
 June 7, " Citation returned, service acknowledged. Copy
 filed.
 " " " Citation returned, service acknowledged. Copy
 filed.

4 United States District Court, District of New Jersey.

NEW RIVER COLLIERIES COMPANY,

vs.

At law. No. 2926.

UNITED STATES OF AMERICA.

Docket Entries.

Mar. 8, 1921. Summons issued.
 " 12, " Summons and complaint returned, service acknowl-
 edged and filed.
 " 29, " Answer, filed.
 " " " Reply, filed.
 " " " Trial.
 " 30, " "
 " 31, " " verdict for plaintiff.

Apr. 15, " Rule denying application for new trial, filed.
 " " " Rule for judgment final for plaintiff for \$9,279.27,
 filed.
 " " " Recording judgment.
 May 25, " Bill of exceptions, filed.
 " " " Assignments of error, filed. (U. S. Circuit Court
 of Appeals.)
 " " " Petition for writ of error, filed.
 " " " Order allowing writ of error, filed.
 " " " Writ of error issued. Copy filed.
 " " " Citation issued.
 June 7, " Citation returned, service acknowledged. Copy
 filed.
 " " " Citation returned, service acknowledged. Copy
 filed.

5 United States District Court, District of New Jersey.

NEW RIVER COLLIERIES COMPANY, }
 vs. } Case No. 2756.
 UNITED STATES OF AMERICA. }

Judgment.

Filed April 15, 1921.

April 15, 1921. Judgment for plaintiff for two hundred thirteen thousand one hundred dollars, eleven cents and costs.

Damages-----\$213, 100. 11
 Costs-----

Judgment signed,
 J. L. BODINE, *Judge.*

6 UNITED STATES OF AMERICA,
District of New Jersey, ss. No. 2756.

Summons.

Filed November 29, 1920.

*The President of the United States of America to United States of
 America:*

You are summoned to answer the annexed complaint of The New River Collieries Company, a corporation created by and existing under the laws of State of New Jersey and a citizen of and inhabitant within the said State and district, in an action at law in the District Court of the United States for the District of New Jersey. And take notice that unless you file your answer to said complaint with the Clerk of the District Court of the United States, for the District

of New Jersey, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, the Honorable John Rellstab, judge of said court, at Trenton, this nineteenth day of November, A. D. nineteen hundred and twenty.

[SEAL]

GEORGE T. CRANMER,
Clerk.

By CHARLES S. CHEVRIER,
Deputy.

7 Served the within summons and complaint by delivering to and leaving with Isah Matlack, assistant United States district attorney for United States of America, in the city of Trenton, district of New Jersey, on the 29th day of November, 1920, and at the same time showing person this original with the seal of the court attached and informing him of its contents.

ALBERT BOLLSCHWEILER,
United States Marshal.
By W. B. SNOWDEN,
Chief Deputy.

8 In the United States District Court, District of New Jersey.

THE NEW RIVER COLLIERIES COMPANY, A corporation created by and existing under the laws of State of New Jer- sey, and a citizen of and inhabitant within the said State and district,	} Sessions, 1920. No. 2756.
<i>vs.</i>	

UNITED STATES OF AMERICA.

Complaint.

Filed November 29, 1920.

The plaintiff, The New River Collieries Company, a corporation created by and existing under the laws of the State of New Jersey, and a citizen of and inhabitant within the State and district of New Jersey, claims to recover of the defendant the sum of four hundred and thirty-two thousand, two hundred and twenty-one dollars and forty-nine cents (\$432,221.49), with legal interest thereon, as hereinafter set forth, which is justly due and owing by the defendant, to plaintiff, by reason of the following:

(1) By virtue of the authority conferred by an act of Congress of the United States, duly approved August 10th, 1917, 40 Stat. 276, the President of the United States, acting through the Navy Department of the United States, commandeered and requisitioned at

Newport News and Sewall's Point, Hampton Roads, Virginia, a certain necessary fuel as in said act of Congress set forth, namely, bituminous coal, which belonged to the plaintiff, at the times
9 and in the quantity set forth in a true and correct statement thereof hereto attached and made a part hereof, marked "Exhibit 1."

The said coal was commandeered and requisitioned from or through the deputy commissioner of the Tidewater Coal Exchange, the superintendent of terminals of the Virginian Railroad at Sewall's Point, Norfolk, Virginia, the Sewall's Point Coal Exchange, the Virginian Railway, and the Chesapeake & Ohio Coal & Coke Company, the selling agent of the plaintiff.

All of the aforesaid coal was received, accepted, retained, and used by the United States of America.

(2) The fair and reasonable value and true market prices of said coal so commandeered and requisitioned as aforesaid, at the times and places and in the quantities as aforesaid, were as stated in "Exhibit 1" hereto attached.

(3) During the whole of the period during which said coal was commandeered and requisitioned from claimant, there was a ready and constant market for said coal at Sewall's Point and Newport News, Hampton Roads, Virginia, where said requisitions were made from plaintiff, and said coal was then and there being continuously sold in large quantities.

(4) Plaintiff avers that the only measure of just compensation for private property commandeered, and requisitioned by the United States of America as in the present case, is the fair market value thereof at the time and place of delivery as shown by the current market price in numerous transactions of purchase and sale. Plaintiff avers that fair market values and current market prices of the materials commandeered and requisitioned by the United States as aforesaid are as stated in "Exhibit 1" hereof.

(5) Plaintiff avers that it is entitled to just compensation which is the monetary equivalent of its property at the time of the delivery thereof, pursuant to the commandeering or requisitioning
10 thereof. Payment in full not having been made at said time, plaintiff avers that its right to just and full compensation as of said dates of delivery requires the allowance of compensation or damages for delay in payment. Plaintiff avers that by reason of such delay in payment, it is entitled to compensation at the rate of six per centum per annum on the amount due for each requisition, from the respective dates of delivery, and that said rate of six per centum per annum is the fair and reasonable value for the use of money during the period covered by this claim.

(6) Plaintiff avers that no part of said sum has been paid by or on behalf of defendant to plaintiff and the whole sum thereof.

together with compensation or damages for the detention thereof, is still due and owing by defendant to plaintiff.

[SEAL.]

THE NEW RIVER COLLIERIES COMPANY,
By JOHN K. MACGOWAN,
President.

Attest:

PHILIP KENNEDY,
Secretary.

COULT & SMITH and IRA JEWELL WILLIAMS,
For Petitioner.

11 UNITED STATES OF AMERICA,
Southern District of New York, ss.

John K. MacGowan, being duly sworn according to law, deposes and says that he is the president of the New River Collieries Company, the plaintiff above named; that he is authorized to make this affidavit on its behalf; that he has read the foregoing statement of claim and is familiar with the facts, and that the facts set forth therein are true and correct, to the best of his knowledge, information and belief.

JOHN K. MACGOWAN.

Sworn to and subscribed before me this 12th day of November, 1920.

[SEAL.]

CHRISTOPHER J. ACER,
Notary Public, Kings County, No. 122.
(Certificate filed in N. Y. County, No. 107.)

12

EXHIBIT "1."

Coal Confiscated by Navy Department.

Date—1919.	Coal.	Invoice number.	Market prices f. o. b. mines.	Amount.
Sept. 18	8,500 gross tons, New River	5,570	\$5.00	\$42,500.00
Oct. 17	2,319 " " " "	5,788	5.00	11,595.00
Dec. 1	5,000 " " " "	5,903	*4.536	22,680.00
1920				
Jan. 28	2,864 " " " "	5,919	*4.536	12,991.10
Feb. 2-5	4,668.6071 G " " "	5,935	*4.536	21,176.80
Mar. 23	3,500 Gross " " "	6,075	*4.536	15,876.00
Jan. 23				
Feb. 21	155.2232 " " " "	6,074	*4.536	704.09
Mar. 4				
Apr. 23	3,170 " " " "	6,076	6.50	20,605.00
June 3	3,479 " " " "	6,114	11.00	38,269.00
" 3	2,925 " " " "	6,115	11.00	32,175.00
June 2	583 " " " "	6,116	11.00	6,413.00
Aug. 3	4,981 " " " "	6,202	16.00	79,696.00
Sept. 7	4,994 " " " "	6,291	14.70	73,411.80
Sept. 15	1,991 " " " "	6,292	13.70	27,276.70
Oct. 23	1,960 " " " "		13.70	26,852.00

51,089.8303

\$432,221.49

* Price fixed by Fuel Administration.

(Endorsed) United States District Court, District of New Jersey—The New River Collieries Company, a corporation, plaintiff, vs. United States of America, defendant. Sessions 1920, No. Complaint—Coults & Smith, 763 Broad Street, Newark, N. J., and Brown & Williams, 1321 Chestnut St., Philadelphia, Pa., attorneys for plaintiff. Filed Nov. 29, 1920, at 11 o'clock a. m. George T. Cranmer, clerk.

13 United States District Court, District of New Jersey.

THE NEW RIVER COLLIERIES COMPANY,	}	No. 2756.
a corporation,		
vs.		
UNITED STATES OF AMERICA.		

Answer.

Filed January 8, 1921.

Defendant, United States of America, appearing herein by Isaiah Matlack, assistant United States attorney for the district of New Jersey, answering the complaint of the plaintiff herein, says:

1. As to the allegations contained in the first paragraph of the complaint, defendant has not sufficient knowledge or information to form a belief.

2. Defendant denies the allegations contained in paragraph two of the complaint.

3. As to the allegations contained in the third paragraph of the complaint, defendant has not sufficient knowledge or information to form a belief.

4. Defendant denies the allegations contained in paragraph four of the complaint.

5. Defendant denies the allegations contained in paragraph five of the complaint.

6. Defendant denies the allegations contained in paragraph six of the complaint.

ISAIAH MATLACK,
Assistant United States Attorney,
District of New Jersey.

14 (Endorsed) U. S. District Court, District of New Jersey—The New River Collieries Co., a corporation, vs. United States of America. Answer—Elmer H. Geran, U. S. attorney, Trenton, N. J. We hereby consent to the filing of the within answer as of time. Coults & Smith, Attys. for plaintiff, Jan. 7th, 1920. Filed Jan. 8, 1921, at 11 o'clock a. m. George T. Cranmer, clerk.

NEW RIVER COLLIERIES COMPANY,
a corporation,
vs.
UNITED STATES OF AMERICA.

} Amended Answer. (1st Case.)
No. 2756.

Amended answer.

Filed February 9, 1921.

I.

Defendant, United States of America, appearing herein by Fred-
eric M. P. Pearse, assistant United States attorney for the district
of New Jersey, answering the complaint of the plaintiff herein,
says:

1. The defendant admits the allegations contained in the first paragraph of the complaint.
2. The defendant denies the allegations contained in paragraph 2 of the complaint.
3. The defendant denies paragraph 3 of the complaint.
4. The defendant denies paragraph 4 of the complaint.
5. The defendant admits the allegations contained in paragraph 5 of the complaint, wherein the plaintiff alleges that it is entitled to just compensation, which is the monetary equivalent of its property at the time and place of the delivery thereon, pursuant to the commandeering or requisitioning thereof, and defendant denies the further allegations in paragraph 5 of the complaint.
6. The defendant admits that no part of the sum demanded by the plaintiff has been paid by or on behalf of defendant, but denies that the whole sum thereof, together with compensation or damages for the detention thereof is still due and owing.

II.

As a separate and distinct defense in the above-entitled action, the defendant alleges that the defendant has at all times tendered and offered to pay to the plaintiff just compensation, as ascertained and determined by the President of the United States, to the extent of seventy-five per centum of the amount so ascertained and determined by the President of the United States, and that the plaintiff has refused and still does refuse to accept the same.

III.

As a further separate and distinct defense defendant says that the court is without jurisdiction and the plaintiff without remedy in this court against the defendant, the United States of America, with respect to the sums of money which the plaintiff alleges are due to it by the defendant, to the extent of seventy-five per cent

of the amount of just compensation for the property of the plaintiff requisitioned by the President of the United States, as authorized by law, as ascertained and determined by the President of the United States.

FREDERIC M. P. PEARSE,
*Assistant United States Attorney,
 District of New Jersey.*

(Endorsed) United States District Court, District of New Jersey—New River Collieries Company, a corporation, vs. United States of America. Amended answer—Elmer H. Geran, United States attorney, Trenton, N. J. Filed Feb. 19, 1921, at 11 o'clock a. m. George T. Cranmer, clerk.

17 In the United States District Court, District of New Jersey.

THE NEW RIVER COLLIERIES COMPANY, A CORPORATION created by and existing under the laws of State of New Jersey, and a citizen of and inhabitant within the said State and district, plaintiff,	} Case No. 1. Action at Law. No. 2756.
<p style="text-align: center;">vs.</p> UNITED STATES OF AMERICA, DEFENDANT.	

Reply.

Filed February 24, 1921.

I.

The plaintiff joins issue on the first defense contained in the defendant's amended answer.

II.

The plaintiff denies the second defense contained in the defendant's amended answer.

III.

The plaintiff denies the third defense in defendant's amended answer and hereby gives notice that at the trial of the action it will move to strike out the third defense contained in the defendant's amended answer, on the ground that it is a defense to the jurisdiction of the court and must be taken advantage of, by motion, before the filing of an answer.

COULT & SMITH,
Attorneys for Plaintiff.

18 (Endorsed.) United States District Court, District of New Jersey—The New River Collieries Company, a corporation created by and existing under the laws of the State of New

Jersey, and a citizen of and inhabitant within the said State and district, plaintiff, vs. United States of America, defendant. Action at Law—Reply—Coult & Smith, attorneys for plaintiff, 763 Broad Street, Newark, N. J. Filed Feb. 24, 1921, at 11 o'clock a. m. George T. Cranmer, clerk.

19 In the United States District Court, District of New Jersey.

THE NEW RIVER COLLIERIES COMPANY, A CORPORATION created by and existing under the laws of State of New Jersey and a citizen of and inhabitant within the said State and District, plaintiff,

April Term, 1921.
Case No. 1.

vs.

UNITED STATES OF AMERICA, DEFENDANT.

Rule for Judgment.

Filed April 15, 1921.

This action coming on for trial at the January term, 1921, on the 29th day of March, 1921, before the honorable Joseph L. Bodine and a jury, by order of this court and by agreement of the attorneys for the respective parties made in open court, and this action being consolidated and tried with cases of the same title and designated as case No. 2 and case No. 3 by order of the court made on said date, on the agreement of counsel in open court; and it appearing that there is included in the amount sued on in case No. 1 the sum of ninety-seven thousand and three hundred and fifty-four dollars and fifty-six cents (\$97,354.56) which has already been paid by the defendant to the plaintiff, which payment was made on the 11th day of February, 1921; and it further appearing that there is included in the amount sued on in this action the sum of forty-five thousand two hundred and forty-two dollars and seventy cents
20 (\$45,242.70) which has not as yet been paid by the defendant to the plaintiff; and it further appearing that said sums amount in all to one hundred and forty-two thousand five hundred and ninety-seven dollars and twenty-six cents (\$142,597.26), representing 75 per cent of the amount fixed and determined by the President of the United States, acting on behalf of the defendant, as just compensation to the plaintiff for the necessities set forth in the complaint herein, which necessities were taken by order of the President of the United States for the defendant for use of the United States Navy, pursuant to the Acts of Congress; and it further appearing that the sum so fixed and determined as just compensation was not satisfactory to the plaintiff, the party entitled to compensation therefor; and it further appearing by the consent of the parties made in open court that the said sums aggregating one hundred and forty-two thousand five hundred and ninety-seven dollars and twenty-six cents (\$142,597.26) shall be withdrawn from

the amount sued on in the action here pending, and taken from the consideration of the court and jury, and the amount of said 75 per cent which remains unpaid be otherwise paid by the defendant to the plaintiff and recovery therefor be not barred by the judgment in this action, and the plaintiff shall receive payment therefor as it is entitled to, pursuant to the statute in such case made and provided; and the pleadings admitting the kind, quality, and amount of the coal sued for and the dates on which the same was taken by the defendant from the plaintiff, and the court, with the consent of the parties made in open court, having determined that the jury should render a special verdict stating the rate per ton as of the various dates upon which said coal was taken possession of by the defendant, to be paid by the defendant to the plaintiff for the coal so taken and that in its verdict the jury should state the amount, if

any, allowed for the use or detention of the money; and the court determining that the judgment entered on the special verdict of the jury herein shall be for such sum as added to said sum of one hundred and forty-two thousand five hundred and ninety-seven dollars and twenty-six cents (\$142,597.26)—being the aforesaid sum of 75 per cent of the amount ascertained by the President of the United States as just compensation for the necessities taken as aforesaid and more particularly described in the bill of particulars attached to the complaint herein—shall make up such sum as will be just compensation for such necessities described in the bill of particulars attached to the complaint herein, so taken; and this action having been heard by and submitted to the jury on the 31st day of March, 1921, as aforesaid, the said jury returned a verdict as follows:

Verdict, Suit #1.

"Sept.	18, 1919	\$4.00
Oct.	17, 1919	4.00
Dec.	1, 1919	4.536
	1920,	
Jan.	28, 1920	4.536
Feby. 2 & 5,	1920	4.536
March	23, 1920	4.536
Jan.	23, 1920	4.536
Feby.	21, 1920	4.536
March	4, 1920	4.536
April	23, 1920	4.425
June	3, 1920	7.724
"	3, 1920	7.724
"	2, 1920	7.724
Aug.	3, 1920	12.468
Sept.	7, 1920	12.66
"	15, 1920	11.49
Oct.	23, 1920	11.63

No damages allowed for the use of the money."

22 WHEREUPON, the Court determining that the just compensation which the plaintiff is entitled to be paid, determined by and computed on said special verdict, is the sum of three hundred and fifty-five thousand six hundred and ninety-seven dollars and thirty-seven cents (\$355,697.37), it is adjudged that after deducting from said sum of three hundred and fifty-five thousand six hundred and ninety-seven dollars and thirty-seven cents (\$355,697.37) the sum of one hundred and forty-two thousand five hundred and ninety-seven dollars and twenty-six cents (\$142,597.26) the plaintiff recover of the defendant in this action the sum of two hundred and thirteen thousand one hundred dollars and eleven cents (\$213,100.11).

J. L. BODINE, *Judge*.

(Endorsed) United States District Court, District of New Jersey—Case No. 1—The New River Collieries Company, a corporation created by and existing under the laws of State of New Jersey and a citizen of and inhabitant within the said State and District, Plaintiff, vs. United States of America, Defendant—rule for judgment—Coults & Smith, attorneys for plaintiff, 763 Broad Street, Newark, N. J.—filed April 15, 1921—George T. Cranmer, clerk.

23 United States District Court, District of New Jersey.

NEW RIVER COLLIERIES COMPANY,	}	Case No. 2836.
<i>vs.</i>		
UNITED STATES OF AMERICA.		

Judgment.

Filed April 15, 1921.

April 15, 1921. Judgment for plaintiff for nineteen thousand seven hundred dollars, ninety-one cents and costs.

Damages.....	\$19,700.91
Costs.....	

Judgment signed,
J. L. BODINE, *Judge*.

24 UNITED STATES OF AMERICA,
District of New Jersey, ss.

Summons.

Filed January 11, 1921.

The President of the United States of America to United States of America:

You are summoned to answer the annexed complaint of the New River Collieries Company, a corporation created by and existing

under the laws of State of New Jersey and a citizen of and inhabitant within the said State and district, in an action at law in the District Court of the United States for the District of New Jersey. And take notice that unless you file your answer to said complaint with the clerk of the District Court of the United States, for the district of New Jersey, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, the honorable John Rellstab, Judge of said court at Trenton, this 30th day of December, A. D. nineteen hundred and twenty.

[SEAL.]

GEORGE T. CRANMER, *Clerk*.
By R. S. CHEVRIER, *Deputy*.

25 In the United States District Court, District of New Jersey.

<p>THE NEW RIVER COLLIERIES COMPANY, A corporation created by and existing under the laws of the State of New Jersey and a citizen of and inhabitant within the said State and district, plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p>UNITED STATES OF AMERICA, DEFENDANT.</p>	<p>Sessions, 1920. Action at Law. (2nd Case.) No. 2836.</p>
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Complaint.

Filed January 11, 1921.

The plaintiff, The New River Collieries Company, a corporation created by and existing under the laws of the State of New Jersey and a citizen of and inhabitant within the State and district of New Jersey, claims to recover of the defendant the sum of forty thousand six hundred seventy-four dollars and thirty-five cents (\$40,674.35), with legal interest thereon, as hereinafter set forth, which is justly due and owing by the defendant to plaintiff by reason of the following:

1. By virtue of the authority conferred by an act of Congress of the United States, duly approved August 10, 1917, 40 Stat. 276, the President of the United States, acting through the Navy Department of the United States, commandeered and requisitioned at Newport News and Sewall's Point, Hampton Roads, Virginia, a certain necessary fuel as in said act of Congress set forth, namely, bituminous coal, which belonged to the plaintiff, at the times and in the amounts set forth in a true and correct statement thereof hereto attached and made a part hereof, marked "Exhibit 1."

The said coal was commandeered and requisitioned from or through the Sewell's Point Coal Exchange, the superintendent of terminals of the Virginian Railway Company, and the Chesapeake & Ohio Coal & Coke Company, the selling agent of the plaintiff.

All of the aforesaid coal was received, accepted, retained, and used by the United States of America.

2. The fair and reasonable values and true market prices of said coal so commandeered and requisitioned as aforesaid, at the times and places and in the quantities as aforesaid, were as stated in "Exhibit 1" hereto attached.

3. During the whole of the period during which said coal was commandeered and requisitioned from claimant, there was a ready and constant market for said coal at Sewall's Point and Newport News, Hampton Roads, Virginia, where said requisitions were made from plaintiff, and said coal was then and there being continuously sold in large quantities.

4. Plaintiff avers that the only measure of just compensation for private property commandeered and requisitioned by the United States of America as in the present case is the fair market value thereof at the time and place of delivery as shown by the current market price in numerous transactions of purchase and sale. Plaintiff avers that the fair market values and current market prices of the materials commandeered and requisitioned by the United States as aforesaid are as stated in "Exhibit 1" hereof.

5. Plaintiff avers that it is entitled to just compensation which is the monetary equivalent of its property at the time and place of the delivery thereof, pursuant to the commandeering or requisitioning thereof. Payment in full not having been made at said

27 time, plaintiff avers that its right to just and full compensation as of said dates of delivery requires the allowance of compensation or damages for delay in payment. Plaintiff avers that by reason of such delay in payment it is entitled to compensation at the rate of six per centum per annum on the amount due for each requisition, from the respective dates of delivery, and that said rate of six per centum per annum is the fair and reasonable value for the use of money during the period covered by this claim.

6. Plaintiff avers that no part of said sum has been paid by or on behalf of defendant to plaintiff, and the whole sum thereof, together with compensation or damages for the detention thereof, is still due and owing by defendant to plaintiff.

[SEAL.]

THE NEW RIVER COLLIERIES COMPANY,
By JOHN K. MACGOWAN, *President*.
COULT & SMITH,

Attorneys for Plaintiff,
763 Broad St., Newark, N. J.

Attest:

PHILIP KENNEDY,
Secretary.

28 UNITED STATES OF AMERICA, }
Southern District of New York, } ss:

John K. MacGowan, being duly sworn according to law, deposes and says that he is the president of the New River Collieries Com-

pany, the plaintiff above named; that he is authorized to make this affidavit on its behalf; that he has read the foregoing statement of claim and is familiar with the facts, and that the facts set forth therein are true and correct, to the best of his knowledge, information, and belief.

JOHN K. MACGOWAN.

Sworn and subscribed before me this 23rd day of December, 1920.

[SEAL.]

CHRISTOPHER J. ACER,

Notary Public, Kings County, No. 122.

(Certificate filed in N. Y. County, No. 107.)

29

"EXHIBIT 1."

Coal confiscated by Navy Department.

Date—1920.				Invoice number.	Market prices f. o. b. mines.	Amount.
Nov. 5	1,774	gross tons,	New River	6334	\$12.20	\$21,642.80
" 23	819	" "	" "	6349	8.45	6,920.55
" 25	278	" "	" "	6350	8.45	2,349.10
Dec. 8	1,457	" "	" "	6376	6.70	9,761.90
	4,328					\$40,674.35

COULT & SMITH,

Attorneys for Plaintiff.

(Endorsed) United States District Court, District of New Jersey—The New River Collieries Company, a corporation created by and existing under the laws of State of New Jersey, and a citizen of and inhabitant within the said State and district, plaintiff, vs. United States of America, defendant—Action at law. Summons and complaint. (2nd Case)—Coults & Smith, attorneys for plaintiff, 763 Broad Street, Newark, N. J.—Due and legal service of the within summons and complaint is hereby acknowledged this 10th day of January, 1921. Elmer H. Geran, attorney for defendant. Filed Jan. 11, 1921, at 11 o'clock a. m. George T. Cranmer, clerk.

30 United States District Court, District of New Jersey.

NEW RIVER COLLIERIES COMPANY, A CORPORATION,
vs.
UNITED STATES OF AMERICA. } Second Case.

Answer.

Filed February 19, 1921.

I.

Defendant, United States of America, appearing herein by Frederic M. P. Pearse, assistant United States attorney for the district

of New Jersey, answering the complaint of the plaintiff herein, says:

1. The defendant admits the allegations contained in the first paragraph of the complaint.

2. The defendant denies the allegations contained in paragraph 2 of the complaint.

3. The defendant denies the allegations contained in paragraph 3 of the complaint.

4. The defendant denies the allegations contained in paragraph 4 of the complaint.

5. The defendant admits the allegations contained in paragraph 5 of the complaint, wherein the plaintiff alleges that it is entitled to just compensation, which is the monetary equivalent of its property at the time and place of the delivery thereon, pursuant to the commandeering or requisitioning thereof, and defendant denies the further allegations in paragraph 5 of the complaint.

6. The defendant admits that no part of the sum demanded
31 by the plaintiff has been paid by or on behalf of defendant, but denies that the whole sum thereof, together with compensation or damages for the detention thereof is still due and owing.

II.

As a separate and distinct defense in the above-entitled action, the defendant alleges that the defendant has at all times tendered and offered to pay to the plaintiff just compensation, as ascertained and determined by the President of the United States, to the extent of seventy-five per centum of the amount so ascertained and determined by the President of the United States, and that the plaintiff has refused and still does refuse to accept the same.

III.

As a further separate and distinct defense defendant says that the court is without jurisdiction and the plaintiff without remedy in this court against the defendant, the United States of America, with respect to the sums of money which the plaintiff alleges are due to it by the defendant, to the extent of seventy-five per cent. of the amount of just compensation for the property of the plaintiff requisitioned by the President of the United States, as authorized by law, as ascertained and determined by the President of the United States.

FREDERIC M. P. PEARSE,

Assistant United States Attorney,

District of New Jersey.

(Endorsed) United States District Court, District of New Jersey—The United States of America vs. New River Collieries Company, a corporation, vs. United States of America. Answer, 2nd case. Elmer H. Geran, United States attorney. Filed Feb. 19, 1921, at 11 o'clock a. m. George T. Cranmer, clerk.

32 In the United States District Court, District of New Jersey.

THE NEW RIVER COLLIERIES COMPANY, A CORPORATION created by and existing under the laws of State of New Jersey and a citizen of and inhabitant within the said State and district, plaintiff,

vs.

UNITED STATES OF AMERICA.

Action at Law.
Case No. 2.

Reply.

Filed March 30, 1921.

I.

The plaintiff joins issue on the first defense contained in the defendant's answer.

II.

The plaintiff denies the second defense contained in the defendant's answer.

III.

The plaintiff denies the third defense in defendant's answer and hereby gives notice that at the trial of the action it will move to strike out the third defense contained in the defendant's answer, on the ground that it is a defense to the jurisdiction of the court and must be taken advantage of, by motion, before the filing of an answer.

COULT & SMITH,
Attorneys for Plaintiff.

(Endorsed) In United States District Court, District of New Jersey—The New River Collieries Co., etc., plaintiffs, vs. United States of America, defendant—Suit No. 2. Action at law—Reply—Coults & Smith, Attys. for plaintiff, 763 Broad Street, Newark, N. J.—Filed March 30, 1921, at 11 o'clock a. m. George T. Cranmer, clerk.

34 In the United States District Court, District of New Jersey.

THE NEW RIVER COLLIERIES COMPANY, A CORPORATION created by and existing under the laws of State of New Jersey and a citizen of and inhabitant within the said State and district, plaintiff,

vs.

UNITED STATES OF AMERICA, DEFENDANT.

April Term, 1921.
Case No. 2.

Rule for judgment.

Filed April 15, 1921.

This action coming on for trial at the January term, 1921, on the 29th day of March, 1921, before the honorable Joseph L. Bodine

and a jury, by order of this court and by agreement of the attorneys for the respective parties made in open court, and this action being consolidated and tried with cases of the same title and designated as case No. 1 and case No. 3 by order of the court made on said date, on the agreement of counsel in open court; and it appearing that there is included in the amount sued on in case No. 2 the sum of fourteen thousand three hundred and forty-eight dollars and thirty-four cents (\$14,348.34) which has not as yet been paid by the defendant to the plaintiff, representing 75 per cent of the amount fixed and determined by the President of the United States, acting on behalf of the defendant, as just compensation to the plaintiff for the necessities set forth in the complaint

35 herein, which necessities were taken by order of the President of the United States for the defendant for use of the United States Navy, pursuant to the acts of Congress; and it further appearing that the sum so fixed and determined as just compensation was not satisfactory to the plaintiff, the party entitled to compensation therefor; and it further appearing by the consent of the parties made in open court that the said sum of fourteen thousand three hundred and forty-eight dollars and thirty-four cents (\$14,348.34) shall be withdrawn from the amount sued on in the action here pending, and taken from the consideration of the court and jury, and the amount of said 75 per cent, which remains unpaid, be otherwise paid by the defendant to the plaintiff and recovery therefor be not barred by the judgment in this action, and the plaintiff shall receive payment therefor as it is entitled to, pursuant to the statute in such case made and provided; and the pleadings admitting the kind, quality, and amount of the coal sued for and the dates on which the same was taken by defendant from the plaintiff, and the court, with the consent of the parties made in open court, having determined that the jury should render a special verdict stating the rate per ton as of the various dates upon which said coal was taken possession of by the defendant, to be paid by the defendant to the plaintiff for the coal so taken, and that in its verdict the jury should state the amount, if any, allowed for the use or detention of the money; and the court determining that the judgment entered on the special verdict of the jury herein shall be for such sum as added to said sum of fourteen thousand three hundred and forty-eight dollars and thirty-four cents (\$14,348.34)—being the aforesaid sum of 75 per cent of the amount ascertained by the President of the United States as just compensation for the necessities taken as aforesaid and more particularly described in the bill of particulars attached to the complaint herein—shall

36 make up such sum as will be just compensation for such necessities described in the bill of particulars attached to the complaint herein, so taken; and this action having been heard by and submitted to the jury on the 31st day of March, 1921, as aforesaid, the said jury returned a verdict as follows:

Verdict, Suit #2.

" Nov. 5, 1920	\$10.654
" 23, 1920	7.193
" 25, 1920	6.91
Dec. 8, 1920	5.035

No damages allowed for the use of the money."

Whereupon the court determining that the just compensation which the plaintiff is entitled to be paid, determined by and computed on said special verdict, is the sum of thirty-four thousand and forty-eight dollars and twenty-five cents (\$34,048.25), it is adjudged that after deducting from said sum of thirty-four thousand and forty-eight dollars and twenty-five cents (\$34,048.25) the sum of fourteen thousand three hundred and forty-eight dollars and thirty-four cents (\$14,348.34), the plaintiff recover of the defendant in this action the sum of nineteen thousand and seven hundred dollars and ninety-one cents (\$19,700.91).

J. L. BODINE, *Judge*.

(Endorsed) United States District Court, District of New Jersey—Case No. 2—The New River Collieries Company, a corporation created by and existing under the laws of State of New Jersey and a citizen of and inhabitant within the said State and district, plaintiff, vs. United States of America, defendant—Rule for judgment—Coult & Smith, attorneys for plaintiff, 763 Broad St., Newark, N. J. Filed April 15, 1921. George T. Cranmer, clerk.

37 United States District Court, District of New Jersey.

THE NEW RIVER COLLIERIES COMPANY

vs.

UNITED STATES OF AMERICA.

Case No. 2926.

Judgment.

Filed April 15, 1921.

April 15, 1921. Judgment for plaintiff for nine thousand two hundred seventy-nine dollars and twenty-seven cents and costs.

Damages----- \$9,279.27

Costs-----

Judgment signed.

J. L. BODINE, *Judge*.

38 UNITED STATES OF AMERICA,

District of New Jersey, ss. No. 2926.

Summons.

Filed March 12, 1921.

The President of the United States of America to United States of America:

You are summoned to answer the annexed complaint of The New River Collieries Company, a corporation created by and existing

under the laws of State of New Jersey, and a citizen of and inhabitant within the said State and district (Case No. 3), in an action at law in the District Court of the United States for the District of New Jersey. And take notice that unless you file your answer to said complaint with the clerk of the District Court of the United States for the District of New Jersey, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment be entered against you.

Witness the honorable John Rellstab, Judge of Said Court, at Trenton, this eighth day of March, A. D. nineteen hundred and twenty-one.

[SEAL.]

GEORGE T. CRANMER, *Clerk.*
By R. S. CHEVRIER, *Deputy.*

39 In the United States District Court, District of New Jersey.

<p>THE NEW RIVER COLLIERIES COMPANY, A corporation created by and existing under the laws of State of New Jersey and a citizen of and inhabitant within the said State and District, plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p>UNITED STATES OF AMERICA, DEFENDANT.</p>	<p>Sessions, 1920. No. 2926.</p>
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Complaint.

Filed March 12, 1921.

The plaintiff, the New River Collieries Company, a corporation created by and existing under the laws of the State of New Jersey and a citizen of and inhabitant within the State and district of New Jersey, claims to recover of the defendant the sum of twenty-six thousand seven hundred and seventy-nine dollars and five cents (\$26,779.05), with legal interest thereon as hereinafter set forth, which is justly due and owing by the defendant, to plaintiff, by reason of the following:

1. By virtue of the authority conferred by an act of Congress of the United States, duly approved August 10, 1917, 40 Stat. 276, the President of the United States, acting through the Navy Department of the United States, commandeered and requisitioned at Sewall's Point, Hampton Roads, Virginia, a certain necessary fuel as in said act of Congress set forth, namely, bituminous coal, which belonged to the plaintiff, at the times and in the amounts set forth in a true and correct statement thereof hereto attached and made a part hereof, marked "Exhibit 1."

The said coal was commandeered and requisitioned from or through the Sewall's Point Coal Exchange, the superintendent of terminals of the Virginian Railway Company and the Chesapeake & Ohio Coal & Coke Company, the selling agent of the plaintiff.

All of the aforesaid coal was received, accepted, retained, and used by the United States of America.

2. The fair and reasonable values and true market prices of said coal so commandeered and requisitioned as aforesaid, at the times and places and in the quantities as aforesaid, were as stated in "Exhibit 1" hereto attached.

3. During the whole of the period during which said coal was commandeered and requisitioned from claimant, there was a ready and constant market for said coal at Sewall's Point, Hampton Roads, Virginia, where said requisitions were made from plaintiff, and said coal was then and there being continuously sold in large quantities.

4. Plaintiff avers that the only measure of just compensation for private property commandeered and requisitioned by the United States of America as in the present case, is the fair market value thereof at the time and place of delivery as shown by the current market price in numerous transactions of purchase and sale. Plaintiff avers that the fair market values and current market prices of the materials commandeered and requisitioned by the United States as aforesaid are as stated in "Exhibit 1" hereof.

5. Plaintiff avers that it is entitled to just compensation which is the monetary equivalent of its property at the time and place of the delivery thereof, pursuant to the commandeering or requisitioning thereof. Payment in full not having been made at said time.

41 plaintiff avers that its right to just and full compensation as of said dates of delivery requires the allowance of compensation or damages for delay in payment. Plaintiff avers that by reason of such delay in payment, it is entitled to compensation at the rate of six per centum per annum on the amount due for each requisition, from the respective dates of delivery, and that said rate of six per centum per annum is the fair and reasonable value for the use of money during the period covered by this claim.

6. Plaintiff avers that no part of said sum has been paid by or on behalf of defendant to plaintiff and the whole sum thereof, together with compensation or damages for the detention thereof, is still due and owing by defendant to plaintiff.

[SEAL.]

THE NEW RIVER COLLIERIES COMPANY,
By JOHN K. MACGOWAN, *President*,
COULT & SMITH,

Attorneys for Plaintiff.

Attest:

PHILIP KENNEDY, *Secretary*.

42 UNITED STATES OF AMERICA,
Southern District of New York, ss:

John K. MacGowan, being duly sworn according to law, deposes and says that he is the president of the New River Collieries Company, the plaintiff above named; that he is authorized to make this affidavit on its behalf; that he has read the foregoing statement of claim and is familiar with the facts, and that the facts set forth

therein are true and correct, to the best of his knowledge, information, and belief.

[SEAL.]

JOHN K. MACGOWAN

Sworn to and subscribed before me this 2nd day of March, 19

N. E. THIEL.

Notary Public, Kings County No. 15.

(Certificate filed in New York Co. No. 161. Commission expires March 30, 1921.)

43

"EXHIBIT 1."

Coal Confiscated by Navy Department.

Date					Invoice	Market	
1920.					number.	prices	
Dec.		gross	tons,	New		f. o. b.	Amount
				River		mines.	
"	10	790	"	"	6384	\$5. 95	\$4, 700
"	13	257	"	"	6385	5. 45	1, 400
"	14	610	"	"	6386	5. 45	3, 324
"	16	252	"	"	6389	5. 45	1, 373
1921							
Jan.	6	857	"	"	6406	4. 70	4, 027
"	11	406	"	"	6411	4. 70	1, 908
"	13	914	"	"	6429	4. 70	4, 295
"	14	821	"	"	6430	4. 70	3, 858
"	17	150	"	"	6437	4. 70	705
"	18	252	"	"	6440	4. 70	1, 184
		5, 309					\$26, 779

(Endorsed) United States District Court, District of New Jersey
Case No. 3—The New River Collieries Company, a corporation, created
by and existing under the laws of State of New Jersey and a citizen
of and inhabitant within the said State and district, plaintiff, v.
United States of America, defendant. Summons and complaint
Coult & Smith, attorneys for plaintiff, 763 Broad Street, Newark
N. J. Due and timely service of within summons and complaint
hereby acknowledged, E. H. Geran, U. S. attorney. Filed Mar. 13
1921, at 11 o'clock a. m. George T. Cranmer, clerk.

44 United States District Court, District of New Jersey.

NEW RIVER COLLIERIES COMPANY, A CORPORATION,

tion.

28.

UNITED STATES OF AMERICA.

Third case. No. 2926

Answer.

Filed March 29, 1921.

I.

Defendant, United States of America, appearing herein by Frederic M. P. Pearse, assistant United States attorney for the District of New Jersey, answering the complaint of the plaintiff herein, says:

1. The defendant admits the allegations contained in the first paragraph of the complaint.

2. The defendant denies the allegations contained in paragraph 2 of the complaint.

3. The defendant denies the allegations contained in paragraph 3 of the complaint.

4. The defendant denies the allegations contained in paragraph 4 of the complaint.

5. The defendant admits the allegations contained in paragraph 5 of the complaint, wherein the plaintiff alleges that it is entitled to just compensation, which is the monetary equivalent of its property at the time and place of the delivery thereon, pursuant to the commandeering or requisitioning thereof, and defendant denies the further allegations in paragraph 5 of the complaint.

6. The defendant admits that no part of the sum demanded by the plaintiff has been paid by or on behalf of defendant, but denies that the whole sum thereof, together with compensation or damages for the detention thereof is still due and owing.

II.

As a separate and distinct defense in the above-entitled action, the defendant alleges that the defendant has at all times tendered and offered to pay to the plaintiff just compensation, as ascertained and determined by the President of the United States, to the extent of seventy-five per centum of the amount so ascertained and determined by the President of the United States, and that the plaintiff has refused and still does refuse to accept the same.

III.

As a further, separate, and distinct defense, defendant says that the court is without jurisdiction and the plaintiff without remedy in this court against the defendant, the United States of America, with respect to the sums of money which the plaintiff alleges are due to it by the defendant, to the extent of seventy-five per cent of the amount of just compensation for the property of the plaintiff requisitioned by the President of the United States, as authorized by law, as ascertained and determined by the President of the United States.

FREDERIC M. P. PEARSE,
*Assistant United States Attorney,
District of New Jersey.*

(Endorsed) United States District Court, District of New Jersey—New River Collieries Company, a corporation, vs. United States of America—Answer—3rd case—Elmer H. Geran, United States attorney, Trenton, N. J. We consent to filing of within answer as of Mch. 29, 1921, Coult & Smith, attys. of plaintiff—Filed March 29, 1921. George T. Cranmer, clerk.

46 In the United States District Court, District of New Jersey.

THE NEW RIVER COLLIERIES COMPANY, A
corporation created by and existing
under the laws of State of New Jersey
and a citizen of and inhabitant within
the said State and district, plaintiff,
vs.

UNITED STATES OF AMERICA, DEFENDANT.

Case No. 3. Action at
law. No. 2926.

Reply.

Filed March 29, 1921.

I.

The plaintiff joins issue of the first defense contained in the defendant's answer.

II.

The plaintiff denies the second defense contained in the defendant's answer.

III.

The plaintiff denies the third defense in defendant's answer and hereby gives notice that at the trial of the action it will move to strike out the third defense contained in the defendant's answer, on the ground that it is a defense to the jurisdiction of the court and must be taken advantage of, by motion, before the filing of an answer.

COULT & SMITH,
Attorneys for Plaintiff.

47 (Endorsed:) United States District Court, District of New Jersey—The New River Collieries Company, a corporation created—Case No. 3—by and existing under the laws of State of New Jersey and a citizen of and inhabitant within the said State and district, plaintiff, vs. United States of America, defendant. Action at law—Reply—Coult & Smith, attorneys for plaintiff, 763 Broad Street, Newark, N. J. I consent to filing of within reply as of Mch. 29, 1921. Frederic M. P. Pears, ass. U. S. atty. Filed March 29, 1921. George T. Cranmer, clerk.

48 In the United States District Court, District of New Jersey.

THE NEW RIVER COLLIERIES COMPANY,
a corporation created by and exist-
ing under the laws of State of New
Jersey and a citizen of and inhabit-
ant within the said State and dis-
trict, plaintiff.

April term, 1921. Case
No. 3. No. 2926.

vs.

UNITED STATES OF AMERICA, DEFENDANT.

Rule for judgment.

Filed April 15, 1921.

This action coming on for trial at the January term, 1921, on the 29th day of March, 1921, before the honorable Joseph L. Bodine and a jury, by order of this court and by agreement of the attorneys for the respective parties made in open court, and this action being consolidated and tried with cases of the same title and designated as case No. 1 and case No. 2 by order of the court made on said date, on agreement of counsel in open court; and it appearing that there is included in the amount sued on in case No. 3 the sum of seventeen thousand five hundred and ninety-nine dollars and thirty-five cents (\$17,599.35) which has not as yet been paid by the defendant to the plaintiff, representing 75 per cent of the amount fixed and determined by the President of the United States, acting on behalf of the defendant, as just compensation to the plaintiff for

49 the necessities set forth in the complaint herein, which necessities were taken by order of the President of the United States for the defendant for use of the United States Navy, pursuant to the acts of Congress; and it further appearing that the sum so fixed and determined as just compensation was not satisfactory to the plaintiff, the party entitled to compensation therefor; and it further appearing by the consent of the parties made in open court that the said sum of seventeen thousand five hundred and ninety-nine dollars and thirty-five cents (\$17,599.35) shall be withdrawn from the amount sued on in the action here pending, and taken from the consideration of the court and jury, and the amount of said 75 per cent which remains unpaid be otherwise paid by the defendant to the plaintiff and recovery therefor be not barred by the judgment in this action, and the plaintiff shall receive payment therefor as it is entitled to, pursuant to the statute in such case made and provided; and the pleadings admitting the kind, quality, and amount of the coal sued for and the dates on which the same was taken by defendant from the plaintiff, and the court, with the consent of the parties made in open court, having determined that the jury should render a special verdict stating the rate per ton as of the various dates upon which said coal was taken possession of by the defendant, to be paid by the defendant to

the plaintiff for the coal so taken, and that in its verdict the jury should state the amount, if any, allowed for the use or detention of the money; and the court determining that the judgment entered on the special verdict of the jury herein shall be for such sum as added to said sum of seventeen thousand five hundred and ninety-nine dollars and thirty-five cents (\$17,599.35)—being the aforesaid sum of 75 per cent of the amount ascertained by the President of the United States as just compensation for the necessities taken as aforesaid and more particularly described in the bill of particulars attached to the complaint herein—shall make up such sum as will be just compensation for such necessities described in the bill of particulars attached to the complaint herein, so taken; and this action having been heard by and submitted to the jury on the 31st day of March, 1921, as aforesaid, the said jury returned verdict as follows:

Verdict, Suit #3.

" Dec. 10, 1920	
" 13, 1920	\$3.75
" 14, 1920	5.30
" 16, 1920	5.39
	4.92
	1921.
Jan. 6, 1921	5.06
" 11, 1921	4.92
" 13, 1921	4.50
" 14, 1921	4.50
" 17, 1921	4.53
" 18, 1921	4.53

No damages allowed for the use of the money."

Whereupon, the court determining that the just compensation which the plaintiff is entitled to be paid, determined by and computed on said special verdict, is the sum of twenty-six thousand eight hundred and seventy-eight dollars and sixty-two cents (\$26,878.62), it is adjudged that after deducting from said sum of twenty-six thousand eight hundred and seventy-eight dollars and sixty-two cents (\$26,878.62) the sum of seventeen thousand five hundred and ninety-nine dollars and thirty-five cents (\$17,599.35), the plaintiff recover of the defendant in this action the sum of nine thousand two hundred and seventy-nine dollars and twenty-seven cents (\$9,279.27).

J. L. BODINE, *Judge*.

51 (Endorsed:) United States District Court, District of New Jersey—Case No. 3—The New River Collieries Company, a corporation created by and existing under the laws of State of New Jersey, and a citizen of and inhabitant within the said State and district, plaintiff, vs. United States of America, defendant—Rule for judgment—Coult & Smith, attorneys for plaintiff, 763 Broad St., Newark, N. J.—Filed April 15, 1921, George T. Cranmer, clerk.

52

Bill of exceptions.

Filed May 25, 1921.

United States District Court, District of New Jersey.

Before Hon. Joseph L. Bodine, D. J., and a jury.

THE NEW RIVER COLLIERIES COMPANY, A CORPORATION CREATED
by and existing under the laws of the State of New Jersey
and a citizen and inhabitant within the said State and
district,

against
THE UNITED STATES OF AMERICA.

Trenton, N. J., March 29, 1921.

Appearances: Ira Jewell Williams, Esq., Charles L. Guerin, Esq., and William A. Smith, Esq., attorneys for plaintiff; Frederic M. P. Pearce, Esq., United States attorney, for the Government.

A jury was impanelled, accepted, and sworn.

Plaintiff's counsel opened to the jury as follows:

Mr. WILLIAMS. May it please your honor and gentlemen of the jury: This is a suit brought by the New River Collieries Company of Trenton against the United States of America to recover just compensation for the coal commandeered by the Navy Department during the period of time beginning September 18, 1919, and ending January 18, 1921.

53 There are really three cases before you, and I take it there will have to be three separate verdicts, as will be explained later, because there was first a case brought to cover up to October 23, 1920, and in that case we have received after suit a certain amount of money which will be explained to you, and the Government will be entitled to that on account.

In the other two suits we have not received anything on account, and the amount which the Government admits under the 75 per cent clause of the act authorizing this commandeering, the act provided that the Government is to pay 75 per cent of the amount which the Government thinks is right, and with the right to the plaintiff to bring suit for the balance as just compensation. That has not been paid, but the Government has agreed to pay it and shortly will pay it, and that amount will be eliminated from your consideration.

So that these suits in effect are brought to recover the balance of just compensation for coal commandeered by the Navy.

Now, this coal was New River bituminous coal. You doubtless, many of you, have heard of Pocahontas coal. Now, I had never heard of New River coal before meeting these gentlemen, but I had heard of Pocahontas coal, and it is in West Virginia, and the New River field is in the same general neighborhood and the same kind

of coal, and it is largely used; both coals are used indiscriminately as I understand, by the Navy, for fuel.

The outgrowth of New River coal during this period was about thirty-six or thirty-five million tons. The plaintiff itself, the New River Coal Co., produced between 900,000 and a million tons. The total commandeered from the plaintiff in the three suits was 60,726 tons.

We will show you that there were constantly large sales of coal of New River coal, and that there was a market for New River coal. And we will also show you what the market prices were
54 which were paid for the coal at these various times. And we will ask you to decide under instructions from the court that just compensation under the Constitution means what a man could have gotten for what he owned in the market, the market price, what he could have gotten for it. In other words, if your farm or business is commandeered by the Government and taken over, what is the fair market price of that is what the Government should pay. If you have a crop and the Government takes your crop or your stock of wheat or anything that you might own, what you could get from somebody else readily in the open market is the measure of just compensation.

We will show you that not only there was a market but that there was a vigorous demand for coal during this period and that the plaintiff could readily have sold the coal which was commandeered by the Government at the prices which we will show you with regard to the various dates in question.

Now, the coal market did not remain stationary during this period, as probably some of you know from your experience, and the export coal market, because this was export coal, this was coal that was intended to be used for bunkers of ships or for cargoes of ships. export coal did not remain stationary. During the middle part of the year 1920 especially the export market responded to extraordinary world conditions—the shortage of coal from Germany and the action of Great Britain in putting on an embargo under which there were only 25,000,000 tons of coal shipped from Great Britain as against 85,000,000 tons a year in the period previously to the war. That had the effect of sending up prices and sending up the demand, and the prices that will be told you by the witnesses during that period were high. Then having reached the high point, whatever goes up is sure to come down, and eventually did come down to lower prices than at the beginning of the period.

55 During a part of the period from December 1st to March 4th—December 1, 1919, to March 4, 1920—the situation was affected by price fixing, the Fuel Control ordained that the prices for New River coal for export should be the prices which will be told you, \$4.536 per ton. For that period our claim is merely for the fixed prices. It is an interesting thing that the prices fixed in respect of export coal was, I believe, \$1.75 higher than the price fixed for coal for inland consumption, and the reason for it was, of course, that

there was no special object in protecting the foreigner who has to come here to buy coal and compelling our citizens to sell the coal to the foreigner at a very low price.

Now, the Government declined to pay us market prices for the coal, and that is the question before you, and curiously enough during the period at which even the prices were fixed on the part of the Government, my understanding is that the Government, acting through the Navy Department, now says that although the Fuel Administrator, who was vested in authority by the President by laws to say what the price should be, said the price for this kind of coal for export should be so and so—the Government is not going to pay it, and then say the Government is not going to pay—the Government does not have to pay to the citizens whose property he could sell easily and readily for gold nuggets, with a ready demand. So that they say they are not obliged to do that. Our position is that the provisions of the Constitution as to just compensation necessarily means that the citizen is to be protected in the possession of his property and that he cannot be deprived of it by the Government except upon paying what other people would be obliged to pay in like manner as between citizens.

Now, this view as to the measure of damages is no new or unusual view, because I think you all know that if somebody had agreed to deliver personal property to you and he had failed to deliver it
56 to you at a price which was agreed upon, and then you had to go out and buy on the market in order to get what you wanted, you would be entitled to recover from the man who did not keep his contract the difference between the contract price and the market price at the time and place of delivery.

And in the same way, if you ordered things from some one and did not stipulate the price, he could not charge you more than the market and you could not ask him to give them to you at less than the market.

And so in this case we shall ask for that measure of damages. Now, this coal was all shipped from the mines in New River to Hampton Roads. It all went into a pool there in which all the coal of this quality was given to the Government, and the Navy from time to time as it wanted coal took that coal, ordered that coal from the pool for immediate use, so that the prices which we will ask for are what are called spot prices. That is to say, not a contract for future delivery by what the price was for immediate delivery on the day in question.

Defendant's counsel opened to the jury as follows:

Mr. PEARSE. May it please the court and gentlemen of the jury. It has been my privilege to appear before you on frequent occasions recently in cases where the Government is the plaintiff. We now come before you in a case where the Government is defending itself.

Now, this defense is brought about, of course, by reason of the war. As Mr. Williams has explained to you, the subject matter of this

suit is coal which was taken by the Navy from the New River Collieries Co. He makes use of the word "citizen." I suppose that is a perfectly proper expression, but usually when you speak of a citizen who is alleged to have been deprived of some of his property you look upon the poor individual who has suffered at the hands of his Government or somebody else. So in this particular case do not

get the impression that it is one of that class who is a litigant
57 in a court, but rather the New River Collieries Co., which, as

Mr. Williams has explained to you, is apparently a corporation doing a large business in the mining and producing and exporting of coal.

Under the acts which were passed on account of the war, it is probably a matter of common knowledge with you that one of the necessary powers given to the Government in order to properly prosecute the war and to protect the Government and the people of the United States against profiteering and extortionate demands for prices for things, the power, as I say, was given to the President, through his cabinet officers and the various departments over which they have control, gave them the right to take these goods on condition that the Government should pay what is called just compensation. Thereupon, if the person or corporation whose property was taken was not satisfied with the amount which the Government said should be paid as just compensation, the law provides that there shall be paid to that individual 75 per cent of the amount which the Government awarded him, the remaining 25 per cent to rest in the hands of the Government subject to a suit, such as the suit which is brought here to determine whether the Government was right, whether the Government was wrong, and what was the price that should be paid as just compensation for the property taken.

As Mr. Williams has also explained to you, it is true that a part of this 75 per cent has been paid. The remaining part has not been paid, not because the Government—and I know that he does not want to create that impression either—not because the Government has refused to pay the 75 per cent which I have spoken of, but on account of the necessary formalities to which payments of this kind have to go through, with invoices and what-not, and examinations and auditing, and one thing and another, so that some of the later shipments have not as yet been paid for, but that is outside of

58 this case, and the only question which remains to be determined is as to the price over this period of time from September, 1919, to January, 1921, that the Government should be called upon to pay for the coal which it took.

Now, as you can see, the chief question which is involved in this case is just compensation. And what is meant by just compensation? It is not within my province to go into any particular detail and to attempt to define to you what just compensation means; that is within the province of the court, and, of course, the court will instruct you as to what you are to consider under those circumstances.

But the defense of the Government for having taken this coal and offering to pay a particular price rests upon a number of contingencies, reasons, or whatever you may want to call them.

In the first place, I think that we will be able to show you that coal for domestic use has nothing to do with the price of coal for export use, and therefore that any price which may have been obtained for export coal is not to be your guide in determining what should be paid for the use of the coal which the Navy purchased.

In the next place, we will show you that in the year 1919, and down to the later dates, there were certain regulations, and, as my friend on the other side has said, certain price-lists, and that the prices which the Government paid for the coal during that period is the price which the Fuel Administration established for domestic coal, plus an additional amount which was allowed by the Navy to this company for the rise in wages during the period. Therefore, starting off, as we will show you, with the price of \$3.08 a ton f. o. b. mines, that price is admittedly increased to \$3.30 at the beginning, and as we go into the detail of the matter we will show you additional rises. On the other hand, the plaintiff is asking you to allow him a price which it could have gotten for export coal which is so far in excess of the price fixed by the Government that necessarily this action has arisen.

59 In the next place we will show you that on account of the war and as a result of war conditions there was no fair market by which the Government or anybody else could be guided in arriving at what was the fair price to pay for this coal, and therefore we have to resort to a much more accurate method which was to take the figure of the Federal Trade Commission and other commissions as to cost, and we will show to you that those cost figures were furnished by the companies themselves, and add to that a reasonable profit, and having done that, we say that we have given to this plaintiff company just compensation—compensation which is not only just to itself but also it is just to the public whose money the Government was spending.

We will show you by testimony of experienced witnesses, as I have said a moment ago, that there is a great difference between spot coal and other kinds of coal, and we will show you that during this period there were contracts and offers made by coal operators in this region which showed that they were in a position and did supply coal at a price which is so near to the price which the Government fixes that it is hardly worth while considering, and, as I also said a moment ago, we will insist that you are not to be guided in arriving at your determination in this case by the spot export market, which price the plaintiff contends for.

We have no desire to keep from anyone money which he is entitled to. But as you know the Government is called upon to protect itself and in that way protect the people, and we only ask that the Government receive, as I know it will, fair consideration at your hands, and I am hopeful that we will be able to show you that with practically

little difference the price which the Government fixed for this coal was the proper price.

Mr. WILLIAMS. May it be stipulated on the record that the three cases of New River Collieries are consolidated for the purpose of trial and that the witnesses herein are sworn in all three cases.

Mr. PEARSE. I think that we might stipulate further, if Mr. Williams has no objection; he said that there will be three separate verdicts, it seems to me that that is going to be most confusing and unless there is some legal objection I do not see any reason why the verdicts should not be consolidated.

Mr. WILLIAMS. We will consider that, if the court please, at the same time that we consider the figures with regard to the payments which have not yet been made but which are about to be made, and there will be ample time to-morrow.

EDWIN L. CARPENTER, called as a witness on behalf of the plaintiff being duly sworn, testifies as follows:

Direct examination by Mr. WILLIAMS:

Q. Where do you live?

A. New York City.

Q. What is your business?

A. Coal.

Q. How long have you been in that business?

A. I beg your pardon?

Q. How long have you been in that business?

A. Thirty-four years.

Q. How long have you been connected with the New River Coal Company, the plaintiff in this case?

A. Five years.

Q. In what capacity?

A. Vice president in charge of sales.

Q. What position did you hold with the plaintiff during the period from September 18, 1919, to January 18, 1921?

A. Vice president in charge of sales.

Q. What were the duties of your position?

A. To sell the coal that we produced.

61 Q. During that period what sales of coal did you effect for your company, the New River Coal Company?

A. Nine hundred and seven thousand tons.

Q. Were you familiar with the current market prices which were being paid in the market for New River coal during that period?

A. Yes.

Q. Who ascertained the prices which are named in the bills of particulars in these cases as the market prices of the coal in question and the dates specified?

A. I did.

Q. You did?

A. Yes.

Q. On what did you base those prices?

A. On the sales that I had made about those dates and on queries that I made among the sellers of coal, and also on the general market reports.

Q. About what quantity of New River coal was sold in the market during this period to your knowledge?

A. I would say around thirty-six million tons.

Q. Have you prepared a statement showing the prices which were received by your company in the open market and on the dates in question, on or about the dates in question?

A. I have.

Q. Will you produce it?

A. Yes, sir.

The COURT. Mr. Williams, have you an additional one of those for me?

Mr. WILLIAMS. Yes, sir; here is one, your honor.

Q. You are familiar with the prices which are claimed for the various deliveries made to the Navy in these suits?

A. I am.

Q. Are you able to say whether or not those are the fair market values of the coal on the dates in question?

Mr. PEARSE. I object to that—well, he can answer that yes or no.

A. I am.

Mr. WILLIAMS. Did you object to the form?

Mr. PEARSE. No.

Q. Will you please state whether or not those prices are the fair market prices of the coal on the dates in question?

Mr. PEARSE. If your honor please, I object to that question. It does not seem to me that the time has arrived when that question should be asked. It has not been shown whether or not the prices which he expects to reply to are contract prices for coal or whether or not they are so-called spot.

The COURT. I think it is spot sales, because he said he sold coal in the market and he inquired the market price from other sellers and he was familiar with market conditions.

Mr. PEARSE. Then if he is to testify as to spot sales, the prices of coal sold at the spot sales, I object to it on the ground that it is not evidence in this case upon which a basis could be laid for just compensation.

The COURT. Well, I think that the spot sales price is evidence of just compensation. For that purpose it will be admitted. It may not be the sole criterion, but the prices at which coal is sold in the open market is evidential as to what the value, the just value of that coal was. It might not be the exclusive criterion for the jury, but it has some evidential force.

Mr. PEARSE. I might add further that as I understand the testimony which this witness is about to give, it is with reference to prices at spot sales for export coal, and therefore I make a further objection that the price which is obtained for spot sales or even for contract sales for export coal is not a basis for just compensation.

The COURT. How about that, Mr. Williams?

Mr. WILLIAMS. If the court please, perhaps I better ask another question or two before I get to this.

63 **Q.** Mr. Carpenter, will you explain to the court and jury just how this commandeering took place in respect to the coal which was commandeered by the Navy in these cases?

A. In the first place we objected to the Government taking the coal under the conditions that their orders showed, and prices. The party in charge of the department at Norfolk would just issue a commandeering order that this company—

Mr. PEARSE. If your honor please, I move that that portion of the answer be stricken out that his company objected to the Government taking the coal. There is nothing in this issue to show that it made any difference whether the company objected or not. That is not a question here and it does not seem to me that it is material or relevant to the issue.

Mr. WILLIAMS. I do not object to that being stricken out.

The COURT. I think that point is well taken, that they had a right to take whether you liked it or not, so that it makes no difference whether you liked it or did not like it.

The WITNESS. We objected to it.

Q. What notice did they give you as to the taking of the coal, how long?

A. Sometimes it was twenty-four, forty-eight hours, depending on just when they could figure that their steamer would be in. If it was Government barges, they would shove the barge under chutes and take the coal.

Mr. PEARSE. If your honor please, I was a little late in objecting to the question, but I object to the question and ask to have the answer stricken out. It does not seem to me that it makes any difference under what conditions the coal was taken.

64 **The COURT.** How about that, Mr. Williams? The price you are getting at is just compensation. For the purposes of this suit it is admitted that the coal was taken by the Government. There is nothing predicated against the Government because its necessities required it to take it as it found it, that was its first right to take it. It was maintaining a war; it needed coal. Now that is a fact question which is not in this case. The only question here is what the just compensation is. The testimony ought to bear on the measure of damages.

Mr. WILLIAMS. It is for the purpose of showing whether this was spot coal or not in answer to the objection which Mr. Pearse made a while ago. You asked what the price of coal was, spot coal or contract coal or forward coal—they are different prices, for imme-

diate delivery, for spot delivery, and the question was to show and the answer showed that this was spot coal; and therefore the spot coal price applied. It is of the utmost importance, if the court please.

There is a great deal of difference, as your honor knows, between a contract extending over months and a contract for an order for immediate delivery of coal right on the spot.

The COURT. Yes.

Mr. WILLIAMS. And the witness will so explain.

The COURT. Well now, let the witness tell what spot coal is and then let him tell what contract coal is and then let him tell what the price is for spot coal for home consumption, the price for foreign consumption, and the contract price of coal. Would not that cover your point?

By Mr. WILLIAMS.

Q. I do not know whether you can remember all those questions, Mr. Carpenter, and answer them one by one?

65 A. I will do the best I can. In this business—may I explain a little?

Q. Just first explain what was spot coal and what was contract coal.

A. Spot coal is a term at tide-water, is term of coal which would be demanded within three or four days.

By the COURT:

Q. It is coal for almost immediate delivery?

A. Yes, sir. Contract coal is coal for forward delivery, say two or three or four or five months. We make a contract this month for delivery between now and the first of next year or the first of December, so much per month, so many tons per month. That is contract coal.

By Mr. WILLIAMS:

Q. This coal which is now in question was produced by you in the New River District and shipped where?

A. Shipped to Hampton Roads.

Q. And where did it find its way there?

A. If I understand your question correctly, it found its way to the vessel or to the piers.

Q. It was put in a pool?

A. Oh, I beg pardon; yes, it was under pool No. 1.

By the COURT:

Q. Now, just a second. I do not understand what pool No. 1 is.

A. There was at that time and is now a tide-water coal exchange which all of the suppliers of a certain grade of coal ship their coal into one pool. Then if I sold a cargo of coal or another party sold a cargo of coal, the first vessel in would get the coal that was on hand at tide-water. My coal might be running and yet I get the coal out of the pool at tide-water. That was to prevent delays to vessels and to expedite the unloading of the railroad equipment.

66 Q. Then the pool is really a reservoir into which produced ship coal of a certain grade?

A. Yes.

Q. And from that reservoir coal is drawn, and those who shipped in are paid for the quantities that they have put in?

A. That is correct, sir.

Q. I see.

A. Pool one consisted entirely of mines on the Navy standard.

Q. The coal in question was shipped by you into pool No. 1 contained the coal of operators on the Navy standard list, N

A. Yes.

By Mr. WILLIAMS:

Q. Were you selling other coal during this period?

A. No, sir.

Q. Just pardon me; selling other coal, other New River coal spot terms to various customers during this period?

Mr. PEARSE. I object to that. It does not make any difference it seems to me as an issue in this case whether or not any coal was sold by this company at spot prices or not. In the first place they must show under what terms and conditions the Government took this coal before he can go into any question as to whether or not coal was sold at spot prices.

The COURT. Well, Mr. Pearse, as I understood your former objection, you objected to the way in which the Government did take

Mr. PEARSE. Oh, no. Where there were some written orders where he said they refused to deliver to them—it was the answer which was surrounding the transaction which I was objecting to to the fact that the Government either had written or verbal orders. I was not objecting on those grounds.

67 The COURT. I think that Mr. Williams will agree then to advise the witness to strip his answers of animus.

the witness to strip his answers of animus.

Mr. PEARSE. Perhaps that is a strong term to use, but I could think of any other words.

Mr. WILLIAMS. Since I have not observed that he used any animus.

The COURT. We are all a bit touchy when it comes to the Government coming in and taking our property. It is more or less a national condition.

By Mr. WILLIAMS:

Q. Mr. Carpenter, during what period—how long notice did the Government give you before actually taking this coal?

Mr. PEARSE. If your Honor please, I must object again unless it is shown that that notice is either verbal or written, and if a written notice the records are the best evidence.

The COURT. I think that point is well taken.

A. Are you waiting for my answer?

Q. No; the Court has ruled that the question should not be answered as put. Do you know whether these orders were verbal or written?

A. They were written orders.

Q. Have you the orders?

A. I think you have them.

Q. Here?

A. Yes.

The COURT. Gentlemen, just as a suggestion. I assume there is no dispute but what the order form was identical throughout the period, and if there is no dispute as to the dates, why not have one of the order forms offered, and then the coal was requisitioned in the same manner on the other dates alleged in the complaint.

Mr. WILLIAMS. If the court please, while it is perfectly true that ordinarily we must produce the writing here the question is the time which elapsed between the notice and the taking. It seems to me you can push that in the discretion of the court a little bit far in calling for writings which are not sued on in any way, when the question is whether this was an immediate taking or a taking which was prolonged or noticed in advance. As a matter of fact, I suppose that in commandeering, that you can not have a contract but you would have to have a price fixed at the time of the taking, so that the actual market price at the time of the taking, at the time that the coal is taken, would be the necessary measure of damages, or would be the time at which you would ask, what would be the measure of just compensation.

The COURT. Well, as I understand it, the Navy Department had a particular form of order where coal was taken for the loading of vessels, and that that form of order stated certain things with respect to prices, and so forth and so on? Now, the Navy Department, having taken the coal in question pursuant to a statute, in compliance with that statute it seems to me that the steps that they took should be the basis upon which you would predicate your right of recovery. It would, therefore, be part of your affirmative case to show the terms under which the Navy Department took your coal; then it would be part of your case to go further and show that the price which the Government, or the Navy Department fixed in their order as just compensation was not satisfactory to you, and was not just compensation for the reason that just compensation was any one of a dozen things which you have spoken of in your opening.

Mr. WILLIAMS. I was not aware of having spoken of more than one thing.

The COURT. Market price?

Mr. WILLIAMS. Yes; the market price.

The COURT. There are several factors which enter into the determination of that market.

Mr. WILLIAMS. There might be factors which enter into it, but when you have found the market, why, that is the market. If the court please, the complaint avers the taking of coal according to a bill of particulars, and the answer admits the taking of that coal. Now, the only point is on those particular dates—there is no dispute that the coal was taken on those particular dates. Now, by giving

a notice in advance, even if they should not bind us to an obligation to deliver in future at the price at the time when they notified us the time when the price should be fixed, the measure would necessarily be at the time and place of the taking. They can notify and then withdraw the notice. That being so, I submit that the question is what was the price for immediate delivery on the date of delivery.

The COURT. You have gone into the question of how the taking came about. The district attorney's objection is that the taking took place by virtue of a written order, and that written order is the best evidence of the manner in which the taking occurred, and on that point I think his objection is well taken.

Mr. WILLIAMS. If the court please, I am content to rest on the proposition that necessarily it must be the date of the taking, and that the date of the taking is undisputed on the record.

Q. Let me ask you what was the extent of your familiarity with the market prices of coal during this period?

A. That was my business, to keep track of the market.

Q. To what extent did you keep track of the market?

A. Every twenty-four hours I either made sales or made inquiries as to what the market was.

70 Q. In what business was your company engaged—was it in the export business or in the inland coal business?

A. Principally in the export business.

Q. To what extent was it in the export business?

A. During the period of this time 551 thousand tons of our production was exported.

Q. This coal that had been shipped down to Hampton Roads and taken by the Government, for what purpose was that intended?

A. For export and bunkers.

Q. Direct your attention again, Mr. Carpenter, to the statement which you have prepared. Will you please explain to the court and jury just what your statement shows with regard to the figures?

Mr. PEARSE. If your Honor please, I must object to using this statement, which on its face refers to spot sales. I still insist that spot sales are not the proper measure for just compensation where the coal is taken for domestic use, and, furthermore, until it is shown under what terms the Government took the coal and what were the forms of the requisitioning, how frequently the coal was required, and in what quantities it was required, this witness is not in a position to testify as to any figures, so far as the market value is concerned.

Mr. WILLIAMS. If the court please, the facts appear undisputed on the record as to how the coal was taken.

Mr. PEARSE. It was taken: that is all.

Mr. WILLIAMS. It shows the dates on which it was taken, and the dates on which they were taken were the dates which fixed the question as to the market price—at any rate, it certainly is some evidence

of value to show what others were willing to pay and actually did pay for coal on the days in question.

71 The COURT. The plaintiff alleges that by virtue of the authority conferred by the President of the United States, and so forth and so on—it seems to me that you come directly to the issue as to what was the just compensation for the coal, and I will receive at this time the evidence of this witness with respect to the market for spot coal allowing the Government an exception.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. s.]

Q. Will you proceed, Mr. Carpenter, and explain this statement of the market price of coal from September, 1919, to January, 1921?

Mr. PEARSE. I do not want to be so frequently objecting to everything that this witness is about to testify to, but it seems to me now it should first appear as to who prepared this statement. I do not know whether it is his work or somebody else's work.

Mr. WILLIAMS. I would not offer it if it was not his work.

Q. Who prepared this statement?

A. I did.

Q. From what?

A. From the records.

The COURT. He has his own writing in his hand.

By Mr. PEARSE:

Q. Where did you get the dope from?

By Mr. WILLIAMS:

Q. Tell Mr. Pearse where you got the dope from.

A. I got the dope from the tidewater orders which were approved by me before they went to the accounting department.

72 Q. You have those here?

A. I have those in evidence.

Mr. WILLIAMS. If you want to examine the tidewater orders you can do that, Mr. Pearse.

Q. You have an order for each one of these sales which you yourself made or approved and your initials appear on that order?

A. Correct.

Mr. PEARSE. I believe I am permitted to cross-examine the witness at this point, may I not, so as to see just what these figures are?

The COURT. Yes, I think so.

By Mr. PEARSE:

Q. Are these from records of sales of the New River Collieries Company?

A. Yes.

Q. During the period from September, 1919, to January, 1921?

A. Yes.

Q. And these are only sales made by your company?

A. Yes.

Q. For export trade?

A. Yes.

Mr. PEARSE. No further questions.

By Mr. WILLIAMS:

Q. Will you proceed, Mr. Carpenter, and explain this statement just what it means?

A. Just what is your question, if you please?

Q. Explain the statement and what it means.

A. This statement shows opposite the date of each month head the number of tons of coal sold spot and the price obtained therefor f. o. b. cars mines. For instance, on September 2nd we sold 2,113 tons of coal for \$5.50. On September 16th, 1,610 tons of coal for \$4.74.

Mr. PEARSE. I was not listening to the witness. I did not know that he was starting in to testify. If your Honor please, I hope you will pardon me for objecting so often, but it seems to me that at this point, this gets right to the crux of the very case we are on. This witness is testifying with respect to certain prices that his company received for coal on certain occasions and on certain dates. Now, I do not understand that that is a method by which a market is established. These are isolated prices at which coal was sold by this particular company. Now the contention of the other side is that just compensation, as understood it, is to be based upon the fair market value of the goods taken. That fair market value is certainly not established by testimony of individual sales by the particular company in question.

The COURT. I think that is part of the proof. I do not think it is the whole proof. I do not imagine that Mr. Williams contends that it is the whole proof on the market price. But if you were going into the question of the market price of real estate you would call an expert in real estate; that is, a man who had bought and sold real estate on his own account and on the account of others, and then he would testify as to what price he believed to be a fair price for a certain piece of property which would be based upon the price that was obtained for some similarly situated property at or around the time that he was fixing the price. Now this witness says: "I am the sales officer of this company; I have kept track of the price that has been obtained by our company from the sale of coal spot during this period of time. I will tell you just what we got every time we sold during this entire period. I also keep track of what other people obtained."

Now, I presume that presently Mr. Williams will come to the price which others obtained and then he may follow that up with testimony from other persons similarly situated to show what they obtained, and then the jury from all the testimony would look into the question as to what the market was. It is only evidential; it is not the whole story.

Mr. PEARSE. Then, may I reserve my right to strike out the testimony of this witness with respect to these individual sales if the plaintiff does not back it up by the testimony of other companies that have sold coal at these prices?

The COURT. Well, other testimony with respect to prices.

Mr. WILLIAMS. I would suppose, sir, that as in the case of the sale of real estate that this is merely a matter for expert testimony. The witness is offered as an expert. He says he was familiar with other people's sales; he was familiar with the market, and he proposes to say what the fair market prices were on deliveries by way of the fairest possible terms, to qualify him as a witness, to show that he himself had taken part in a number of sales. I believe that should be reserved for cross-examination. I believe he would be entirely competent to say, "Did you know the market, were you familiar with the market, did you have transactions during this period," and if he said, "Yes," "Are you able to give us the market prices—" for him then to say, "In my opinion these were the fair market prices."

Mr. PEARSE. I think my reservation was allowed.

The COURT. No; I took it that this was a step in the proof. I do not think that the court has any control over counsel as to the number of witnesses that he may call. It may be that counsel intends to rest on the testimony of this one witness and if so that goes to the weight of the evidence but not as to its admissibility.

75 Mr. PEARSE. In order to keep the record clear, then, I understand that your honor overrules my request to subsequently make a motion to strike out this testimony?

The COURT. I could not strike out testimony that is relevant.

Mr. PEARSE. I do not think it is relevant; that is my trouble.

Government's counsel prays an exception which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. S.]

Q. Mr. Carpenter, you were saying that these prices were prices which you obtained on actual transactions during the dates in question. I see that there are certain figures here that are underscored; for instance, on October 18th, 4,754—\$6.23.

A. That is the price obtained at the nearer date to the commandeering of the Government; the Government commandeered on October 17th and on October 18th we sold 4,774 tons for \$6.23.

Q. And does the same apply to the other items?

A. On September 22nd we sold 1,425 tons for \$5; that was four days after the commandeering, on September 18th.

Q. You said that you were the one that determined the prices named in the bill of particulars?

A. Yes.

Q. Are you able from your knowledge of the market and the sales made by you to say what were the fair market prices on this quality of coal on these various dates?

A. In my judgment—

Mr. PEARSE. I object to that question until we find what market price they are talking about, whether it is spot market or contract market or the market for export trade or the market for domestic trade.

76 The COURT. Is not that, Mr. Pearse, really a matter for cross-examination?

Mr. PEARSE. Perhaps it is.

The COURT. It is a matter for the defense to lay its foundation by the cross-examination of this witness. Now, if this witness has not qualified as to his ability to testify as to the market, or if it develops that he is testifying as to a particular market or a market which is not applicable to the matter in suit, why then a different matter will develop.

Mr. PEARSE. The question is incomprehensive; that is what I am objecting to; that is the trouble with the whole situation in a nutshell.

Mr. WILLIAMS. We can take each price at each date.

Mr. PEARSE. I am not worrying about that.

Mr. WILLIAMS. It merely means dragging out the thing indefinitely if you do that, because the same thing applies as to each date.

The COURT. I am with you so far, Mr. Williams.

Mr. WILLIAMS. If my friend wishes to cross-examine any further as to his qualifications as an expert, of course he is offered for that purpose.

Mr. PEARSE. I will take care of that later.

Mr. WILLIAMS. It is usual to cross-examine at this time.

Q. You said you are able to name the fair market prices, Mr. Carpenter?

A. Yes.

Q. Will you please state whether or not the prices which you determined and which you named and which are claimed in the bills of particulars are or are not, in your judgment, the fair market prices at the time and place of the commandeering of this coal, and coal of that quality?

A. They are.

77 Q. Is there any other explanation you can make of that particular exhibit, Mr. Carpenter, in order that we may understand it?

A. I made the exhibit to show our spot sales day by day and underlined the nearest spot sale to the commandeering of the Government simply to show the prices before and after the commandeering and approximating the date of the commandeering. From November to March, inclusive, it will be noted that the price was a Government price of \$4.536 at the mines. From April on it was governed by the market. The sales were all governed then by the market.

Q. Have you a copy with you of the other exhibit made by you, Mr. Carpenter?

A. Yes. I think, Mr. Williams, you only have one copy of that; I have one in my case there.

Q. Could you find it for me?

A. Yes.

(Witness produces copy.)

Q. Mr. Carpenter, for the purpose of the record, will you please fix what you regard as the fair market value of this character of coal on the dates in question? You have before you an exhibit which you prepared which you described.

A. September 18, 1919—

Mr. PEARSE. I desire to interpose my former objection to this testimony and take an exception.

The COURT. Yes.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. s.]

Mr. PEARSE. I do not understand that an exception is necessary.

The COURT. No; it is not necessary.

A. September 18, 1919, \$5; October 17th, \$5; December 1st to April 1st, inclusive, the Government price.

78 Q. Now just explain to the court and jury why you fixed the price at \$4.536, which I understand is the export price?

A. The \$3.08 plus the freight rate of \$2 made \$5.08, and plus \$1.50—let me see; I will have to get a pencil to figure that out.

By the COURT:

Q. You took the export price because that was was the highest price that you could sell your coal for, was it not; that is, after the Government fixed its price it fixed a price for domestic use and it fixed a price for export use?

A. Yes.

Q. And you could have sold your coal for export use and the export price was higher than the domestic price?

A. Yes.

Q. So you set the higher market price, which was the export price; that is the reason for it, is it not?

A. Yes.

The COURT. If the Government wishes I will allow an exception to that question.

Mr. PEARSE. No; that is fine.

By Mr. WILLIAMS:

Q. In those days you were in the export business?

A. That is the reason we took the export price. Do you want me to show how that price was arrived at?

Q. No; I do not think it is necessary if that is the export price.

A. The war tax made the figure in that, six cents war tax.

On April 23rd, \$6.50. On June 2nd and 3rd, \$11. August 3rd, \$16—I beg pardon; this is 1920. September 7th, \$14.70. September

15th, \$13.70. October 23rd, \$13.70. November 5th, \$12.20. November 23rd, \$8.45. November 25th, \$8.45. December 8th, \$6.70. December 10th, \$5.95. December 13th, \$5.45. December 14th, \$5.45. December 16th, \$5.45. January 6th, 11th, 13th, 14th, 17th, and 18th, \$4.70 f. o. b. cars, gross ton, mines.

79 Q. Mr. Carpenter, what would you say as to the demand for this quality of coal on the dates in question and whether or not you could have sold this coal to customers at the prices which you have mentioned?

A. There were many buyers in the market all during that period at which coal could have been sold for export.

Q. Have you before you your Exhibit No. 2?

A. Yes.

Mr. WILLIAMS. I will have this yellow one marked and also this other one.

Marked Exhibits P. 1 and P. 2.

Q. Now, on this Exhibit 2, the first column is the date of the commandeering, is that correct?

A. That is correct.

Q. The second column, the amounts of coal commandeered?

A. Correct.

Q. The third the invoice numbers?

A. Correct.

Q. The fourth, the market price f. o. b. mine, which you have said were the fair market prices at the time and place of delivery?

A. Correct.

Q. The next column is the extension of the amount claimed in those market prices?

A. Yes.

Q. The next column is your spot sales with the order number of the spot sales?

A. Yes.

Q. And the next column beginning on October 23, 1920, is the Norfolk market from November 5, 1920?

A. Yes.

Q. Now, what are the other prices which are mentioned in the last three columns there?

A. The next column are the prices taken from the Black Diamond for the week in which the commandeering was made.

By the COURT.

Q. Is that a trade journal?

A. Yes; all three of those are trade journals.

80 Mr. PEARSE. If your Honor please, I must object to this witness testifying with reference to these various magazines.

It seems to me that the magazines themselves are the best evidence. There may be some very damaging statements in the magazine as to the plaintiff's case and as to what the condition of the market was and the circumstances of the market.

The Court. I know, but he may be proving that something like a stock journal; if so, I take it it is admissible.

Mr. WILLIAMS. It has been so ruled, sir; the Supreme Court of Maryland has distinctly ruled on the question. You can have a trade paper which is recognized as an authority.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. S.]

Q. Please explain to the court and jury what these papers are, what their standing is in the trade with regard to market prices?

A. The Black Diamond is generally considered a very authentic journal on the question of coal, the supply and demand and the prices.

By the Court:

Q. Where is it published?

A. It is published in Chicago, but has an office in New York.

Q. What is its purpose?

A. Its entire purpose is the coal market.

Q. To give reports as to the conditions of the coal market?

A. Yes; all sections of the country.

Q. Does it give price quotations of coal?

A. Yes.

Q. What is Seward's Journal?

A. It is the same kind of a publication and also a coal trade journal.

Q. Where are they published?

A. Seward's Journal is published in New York, and I believe the Coal Trade Journal is published there. I am not quite sure about that.

81

By Mr. WILLIAMS:

Q. I notice on this paper I have before me which has been marked Exhibit P. 2, you give the date of the issue of these various papers, their pages on which the quotations occur and the quotations?

A. Yes.

Q. And that compilation was made by you from those books?

A. I have the books here.

Q. The books are here?

A. Yes. Can I explain the Norfolk market quotations?

Q. Yes.

A. The Norfolk market quotation is gathered by our agent at Norfolk on inquiries among the various dealers every day and telephoned to my office every morning, which is one of the mediums that permits me to justify the market price at that date, together with the data I have gathered from other sources and my own sales.

Mr. PEARSE. I will withdraw my objection to the use of those figures.

The COURT. As to the Norfolk market that presents another question. The information there is gathered by an agent of the plaintiff company and telegraphed to the witness on the day that the information is gathered. Now, as to that I do not know myself whether that speaks with any more authority than mere hearsay.

Mr. PEARSE. I know, but if it is admissible at all, I have no reasons to believe that Mr. Carpenter will not tell the truth about it.

The COURT. I have not, either, but it is not the same sort of proof as the Journal proof. I merely called attention to that because I did not know whether you were following the testimony on that particular point.

Mr. PEARSE. I was not; I did not hear what he said about it.

The WITNESS. The agent is here.

82 Mr. PEARSE. As I understand it, for that particular column which is the Norfolk market for November 3, 1920, those are the prices which the New River Collieries Co. received on those dates.

The COURT. Mr. Pearse, I have just learned from the witness another circumstance, that the agent who gathered the information is here in court, so I think that if the witness testifies that they are the figures that the agent submitted to him, that when the agent is called, why that difficulty is overcome.

Cross-examination by Mr. PEARSE:

Q. You are—you are the vice president of the New River Collieries Co., Mr. Carpenter?

A. Yes.

Q. How large a concern is that?

A. Their production is around 1,000,000 tons per annum, four mines.

Q. What is the capital stock of your company issued and outstanding?

A. Well, now, I do not keep very well posted on that part of it.

The COURT. Mr. Pearse, is that cross-examination?

Mr. PEARSE. He said he was vice president of this company. I want to find out what kind of a company it was.

The COURT. It is a company that does 1,000,000 tons of coal mining a year.

Q. And your mines are located, I don't know whether Mr. Carpenter is called for the purpose of locating this mine—

Mr. WILLIAMS. I will be glad to have you locate it.

Q. Your mines are located in West Virginia, I believe?

A. Yes, in the New River District.

Q. What is known as the New River District?

A. Yes.

Q. And you have five mines there, have you not?

A. Four mines.

83 Q. How many other companies, coal companies, are there operating in that district?

A. You mean just in the New River district or in the district that takes pool #1?

Q. No, the New River district.

A. I should say in the New River district there were 100 mines or 125.

Q. Do you know how many mines there are operating that produce this particular grade of coal?

A. About 250.

Q. In the New River district?

A. Oh, no; the pool #1, Pocahontas is the same as Pool #1, New River. The Government takes both coals.

Q. Practically the same?

A. They are the same grade of coal.

Q. So that the coal at tidewater is a combination of New River coal and Pocahontas coal?

A. Yes. Allow me to straighten you on that. Newport News is entirely New River coal. There is no Pocahontas coal comes in there. Lambert's Point, which is on the Norfolk & Western, is Pennsylvania coal. Sewall's Point is a little Pocahontas, but the majority of it New River; that is the Virginian Railroad. There are three railroads. Now, Pocahontas and New River coal analyze practically the same and the mines on the Navy's acceptable list are in the New River and Pocahontas fields. That is the coal that goes into pool #1 on Hampton Roads; so that during the war period the Navy would take the pool #1 at any pier because they have got the same grade of coal.

Q. That is with respect to the heat B. T. U.'s?

A. Yes; they all run around about 15,000 B. T. U.'s.

Q. And this particular coal is shipped out to the tidewater, to these three places that you have spoken of, or four places?

A. Three places.

Q. Three places, and there it is distributed for foreign and domestic use, is it not?

A. Well, there is no great volume of domestic use through Hampton Roads except the New England States.

84 Q. And as a matter of fact when you speak of export coal you are not speaking of coal which is to be shipped to New England, but you are speaking of coal which is to be sent to foreign countries?

A. For bunkers and for foreign countries.

Q. That is for bunkers, you mean for ships that come there to be supplied with coal for their bunkers?

A. Yes.

Q. And the prices which you have given us are f. o. b. mines?

A. Yes.

Q. That disregards entirely the cost of transportation from the mines to tidewater, the cost of trimming at tidewater?

A. Trimming does not enter into that price.

Q. I say it does not enter into it, either freight or trimming does not enter into the prices which you have given?

A. No.

Q. You have therefore subtracted—

A. May I say for your information that trimming is paid by the vessel, and therefore the seller of the coal has nothing to do with it. What makes up the f. o. b. price is the freight plus the coal at the mine and the war tax.

Q. No trimming charges connected with it?

A. No, sir.

Q. Therefore the prices which you have given are, as I say, f. o. b. mines without any additional?

A. Yes.

Q. And at the same time that covers every other cost and expense in connection with the coal?

A. The quotations at Hampton Roads would be f. o. b. mines plus the freight and war tax, that is all.

Q. And, of course, that freight rate is fixed?

A. Yes; there are two different freight rates on that.

Q. There may be more than one freight rate?

A. That is, up to August 26 it was \$2. And from August 26 on it was \$2.80.

Q. But the prices which you have set forth in your complaint or your complaints in these cases are f. o. b. the mine?

A. That is correct, sir.

Q. And are for gross or net tons?

A. Gross tons.

85 Q. Just to clear up this question in the minds of the court and jury, there is no question here over the freight rate; that is, that rate is paid by the Government, and the only prices we consider are the prices f. o. b. the mine?

A. Correct.

Q. You have stated certain sales made by your company from September, 1919, to September, 1921. You say that those sales represent the prices at which you sold coal for the export trade on those respective dates?

A. Yes. Which column are you speaking of now, if you please?

Q. Exhibit #1. Now, as I understand it, that contains a schedule of sales made by your company known as spot sales for export trade on the dates set forth in the schedule?

A. Export and bunkers.

Q. What is the difference between bunker and export?

A. Well, the coal bunker, the coal taken for the use of a vessel that is possibly going to take a cargo of coal abroad; it is usually a foreign vessel. Of course, we were fortunate in having some

merchant marine during this period that also took bunkers and went into the foreign trade.

Q. Have you any idea how your company arrived at the prices on these various dates which should be charged for this coal?

A. How the company arrived at it?

Q. Yes; your company.

A. The company did not arrive at it; I arrived at it.

Q. Well, then, you, as the representative of the company?

A. All right; thank you. In the first place, my agent at Norfolk would report each morning what the price was there. I would call up various people during the day, dealers in coal in New York, and ask them what their price was on export for that day. I would also get inquiries, receive inquiries for coal and offers of certain prices, and putting two and two together I would make what I thought was all the market would stand, and make quotations. If it went, all right, and if it did not, all right.

86 Q. That is, you charged whatever the traffic would bear; is not that it?

A. That is the idea.

Q. And that, therefore, caused a considerable variation in the price from day to day?

A. You mean for what I sold the coal at?

Q. Yes.

A. Sometimes I sold it for more than the market and sometimes for less; my judgment misled me sometimes.

Q. So, therefore, the figures down here are not necessarily accurate as to what the market was on that day; is that right?

A. Because I have that set forth in the other column, what I thought the market was.

Q. What other column do you mean?

A. I mean on Exhibit 2, column 2, the market price f. o. b. mines. There is the result of my efforts showed me the market price to be at that date.

Q. Take, for instance, in the year 1920, in the month of June, on June 3 apparently there were three sales?

A. June 3 did you say?

Q. June 3 and June 2.

A. No. That is the Government's commandeers, if you please. You have got the sheet that I have here; you have not another sheet. You have got Exhibit #2.

Q. This is going to illustrate exactly what I want, I think. I am on Exhibit 2 now.

A. All right.

Q. In the month of June you say that the price on the 3rd and 2nd of June was \$11?

A. Yes.

Q. Now, in the adjoining column, under "Our Spot Sales," you have got \$10.42?

A. Yes.

Q. What does that mean?

A. That means that we made, the nearest date that we made sale, June 3, netted us at the mines \$10.42.

Q. I see. So that the very highest price which you have already stated that you could charge for the coal you charge the Government on June 3 at \$11, although the highest price you could ascertain was \$10.42?

87 A. No, sir; that was not it, because the market as represented by the trade journals bore out the fact that it was \$11.

Q. I see.

A. And other sources of information. I was below the market in my sale at that time.

Q. Then on August 3, two months later, the price is \$16 a ton?

A. Yes.

Q. Your spot sales on that date was \$15.94?

A. Yes.

Q. On that date the Black Diamond said \$16, and Seward Journal said \$17, and the Coal Trade Journal said \$17.20?

A. Yes.

Q. So that the market price varied somewhat?

A. And on the 18th I sold coal for \$17.44.

Q. So that apparently from these schedules which you have presented the market varied from day to day and from hour to hour is that it?

A. At that time it did; it went up and down very rapidly.

Q. And that, as I understand it, is the market for export trade or bunkers?

A. That is right.

Q. For ships for foreign ports?

A. That was the business we were engaged in; we had no other business.

Q. Yes; and New England ports?

A. We had no business in New England at all.

Q. But some of this coal down there was used for New England ports, was it not?

A. It was.

Q. And the other companies which were in this pool?

A. What is that?

Q. And the other companies whose coal was pooled with your coal?

A. That is true.

Q. And that coal which is in that pool at these various places was also used to supply customers who had contracts for coal, was it not?

A. Yes.

Q. Can you tell us from your knowledge of the coal trade—take, for example, June 3, 1921, where you say the spot price was \$11. What was the contract price for coal on that date?

A. I can not attempt to say that, it might be anything.

Q. Now, it is the custom of the coal trade, is it not, Mr. Carpenter, to consider the month of April as the beginning of the year, usually, when contracts are made?

A. Not in the bunker business or in the export business.

Q. How about the domestic business?

A. The domestic business; yes.

Q. And the contracts are made in the month of April of each year to cover a period of a year in the domestic business?

A. Yes.

Q. Did you have contracts for domestic business at that time?

A. We had three only.

Q. Do you recall what the price was when the contracts were made?

Mr. WILLIAMS. I object to that.

The COURT. How is this cross-examination, Mr. Pearse?

Mr. PEARSE. Well, perhaps it is not; I will withdraw the question, although I don't know whether I should withdraw the question, if your honor please. This witness has testified generally as to the fair market value of coal, and it seems to me that I have not a right to test him or anything that he knows with reference to the market value.

The COURT. Well, is contract price market?

Mr. PEARSE. Certainly; that will be our main contention.

The COURT. I can conceive of why a man who on the first of April makes a contract for the sale of his output during the year—might take a very different price from what he would take if he shipped his coal to tidewater and waited until some one came around to get it.

Mr. WILLIAMS. That is the fact.

Mr. PEARSE. Of course, if your honor please, that may be so, but the Government—

The COURT. I think I will allow it if you do not withdraw it.

Mr. WILLIAMS. If the court please, it seems to me to be quite relevant as to what the price might be for something that may be delivered months hence. The question here is what is the just compensation, the value on the day in question.

The COURT. It is testing the witness as to the foundation of his belief as to the market.

Mr. WILLIAMS. There are two markets, the forward market and the spot market, the present market. We submit that the only relevant question is, what was the value of that thing, at that place, on that day, not what some one was willing to sell the same thing for for two months hence or six months hence.

The COURT. I know, but I think on re-direct examination you can show it with respect to the market, or it may be that this witness does not know about the contract market.

By Mr. PEARSE:

Q. You say you did have contracts?

A. We had three contracts made with people who have been customers of ours for ten years, and we desired to take care of them. It amounted to 3,000 tons a month for the year; that is, the only contracts we had. The balance was coal sold inland, sold at a time when there was an irregularity in transportation and was sold on the market.

Q. And necessarily the irregularity of transportation caused an irregularity in the market, did it not?

A. No, sir; not in the case of the inland because we had not advanced the prices on our customers inland for obvious reasons.

Q. You only advanced the price on the export trade?

A. Correct, because we wanted their money.

Q. And the price at which you were charging for your coal for inland customers yielded you a profit, did it not?

90 Mr. WILLIAMS. I object to that, the question is not proper. That is not the question before the court.

The COURT. I do not see that it is, either.

Mr. PEARSE. I will fight that out later.

The COURT. I might say right now, Mr. Pearse, that I am prepared to follow Judge Mayer of the New York District—

Mr. PEARSE. I do not see any serious objection in following Judge Mayer.

The COURT. I do not, either.

Mr. PEARSE. The only difficulty that we may be confronted with is the Court will not find the facts which was proven before Judge Mayer, and that is that there was a market. Now, if there was a market that may be one thing. But if there was not a market it seems to me other elements may enter into this thing.

The COURT. There are three trade journals setting forth the market prices which seem to be somewhat eloquent proof that there was a market.

Mr. PEARSE. We will go into those three journals a little later; we can not do it all at once.

The COURT. We will adjourn now until to-morrow morning at 10.30.

Adjourned to March 30, 1921, at 10.30 a. m.

Trenton, N. J., March 30, 1921, 10.30 a. m.

EDWIN L. CARPENTER, resumed the stand.

Cross-examination by Mr. PEARSE (continued):

Q. Mr. Carpenter, you were telling us yesterday the tonnage of your mines; that is, the annual tonnage which you said was about how many tons?

A. I said our sales at that time was about 907,000 tons.

Q. And how much of that was what you call export?

A. About 551,000.

Q. Was all of that export?

A. I beg your pardon. The 907,000 were net tons and the 551,000 was gross tons, so that our complete sales would be about 610,000 net tons.

Q. 12 per cent more?

A. Yes; about 12 per cent more.

Q. Was that export quantity all spot?

A. No; about 36 per cent of it was contract and about 33 per cent was spot.

Q. And have you the prices at which the export contract coal was sold for?

A. Not at hand; I think I can give it to you.

Q. Were they lower or higher than spot?

Mr. WILLIAMS. That is objected to. The question here is the market price applicable and the contract price for forward delivery would not be applicable.

The COURT. Now, is not that the crux of the whole case. The question is to find just compensation. The market price for spot coal is one thing; the market price for contract coal is another thing. Would it not be for the jury to find from those two circumstances what the measure of damages would be in these cases?

Mr. WILLIAMS. I think not, sir. Of course, he is asked what the contract price is and the contract price without developing further
92 what that meant might mean a contract for any forward period.

It is evidently something in contradistinction to immediate delivery. Now, does the price which a seller is willing to sell for for forward delivery bear any relation to the spot price, the market price for delivery on that day, or substantially on that day. Here the Government has taken the coal on a particular day and the question is, what was the market price of the coal on that day, not what was the market price of coal for delivery a month hence or three months hence or over a period of years. For instance, would he know that a seller was willing to make a contract over a year at a price higher or lower than the price on a day. That would be his judgment as to what the price was going to be in the future, which is an entirely different thing from what the price is to-day, when you would have the sales on the very day.

Now, the cases, if the court please, are rather clear and distinct not only on the question as to market price, but the market price at the time and place of delivery. Suppose, for instance, this were an action for breach of contract, the measure of damages being the difference between the contract price and the market price. The market price that would be applicable would be the market price at the time and place of delivery, and the witnesses are not permitted to say that on that day coal could be sold or the property could be sold or purchased for delivery in the future at a price other than the price which was applicable on that day.

Of course, if the contract had been a contract for forward delivery, for a breach of that contract, then in fixing the measure of damages you would have to show what the market price was on that day for the forward deliveries. Sometimes, as your honor knows, it is a rather difficult thing to do, but that is what you have to do; you either have to await the time when those prices are proved by actual facts as the event turns out or you sue as of a date, on a breach, what the market price then was for the deliveries contemplated by the contract.

Now, here there was no obligation on the part of the Government to accept for forward deliveries. There was no obligation on the part of the plaintiff except to deliver on the day that it was required to deliver, and until that delivery takes place the right of the plaintiff to sue did not arise, the right of the plaintiff to be reimbursed did not arise.

It seems to me it is merely speculative and throwing no real light on the issue in question to allow any evidence as to anything except the market price at the time and place of delivery. The question of the measure of damages, as your honor knows, has been before the Supreme Court of the United States in a number of cases—

The COURT. I think that the district attorney is predicating this question on the theory that there was not a free market. Now, I take it to be a fact question as to whether there was or was not a free market. Then the determination of that question will control the determination of the measure of damages. If there was a free market, then under the Supreme Court ruling the market price would be the measure of just compensation. If, however, there was not a free market, then the jury would have to look for something besides the market price to determine the measure of damages.

Mr. WILLIAMS. I am not familiar with the cases saying "Free market."

The COURT. Judge Mayer says in his opinion, "The prices prevailing in a market which is not free are not a measure of just compensation," and he cites a Supreme Court case and a Massachusetts case and a Michigan case.

Mr. WILLIAMS. Those cases were along the line of another case, that where there was something in the nature either of a monopoly which interfered with the free flow of the natural law of supply and demand.

The COURT. That is where the situation was created by a person who was claiming the damages?

Mr. WILLIAMS. Not necessarily. There was a Pennsylvania case which he did not cite which by a divided court—the decision was that it was the market which governed in an action for breach of contract, where the proof was that there was a monopoly, we had absolutely dominated the market. That there was not a free market

under those circumstances. I do not know what happened to the case afterwards, because I conceive there must have been great difficulty in establishing any measure of damages at all, but that was the decision and the Supreme Court by a divided court three to two. In that case the plaintiff was not a part of the monopoly at all; it was not so alleged. But here, if the court please, you have the facts; there are three trade journals which cite the market price on those days. There is evidence that there was sold from this district some thirty-five to thirty-six million tons of coal. That this plaintiff sold about 900,000 tons of coal. Now, it would be purely gratuitous at this stage of the proceeding, without any other testimony, to say that there is any possibility that there was not a free market. A high market does not mean that the market is not free, because there were extraordinary conditions that came in here in the way of demand to tend to obviate the market. Until there

is some evidence that the market was not free, until there is
95 some evidence that there was no market within the meaning of the cases, then I submit that the question is not cross-examination and that it is not proper.

Mr. PEARSE. If the court please, in the first place, this witness has testified specifically that on particular dates covering this period his company sold coal at a certain export price at tidewater. Then he goes on to state as a general proposition that the fair market price of the coal on those particular dates was these particular prices which he has set forth. Therefore it seems to me that it is perfectly legitimate and proper cross-examination for the Government to go into the question with him of what made up that market price, whether there was more than one market price and what the conditions of the market were.

The COURT. Now, the plaintiff's contention is this, that there was a market price for immediate delivery, and that that market price for immediate delivery was different from the market price for contract coal; that is, coal that was to be delivered in the future, and because of that difference this coal having been taken, not under contract, that the measure of damages is the market price of the coal taken, as in the same manner as this coal was taken.

Mr. PEARSE. Of course, I must confess that we are anticipating our defense in the cross-examination of this witness and I presume that when the proper time comes we will be permitted to offer evidence to show that there was no market, or at least the market which would not be a free and open market.

The COURT. Then, I think, Mr. Pearse, if that becomes an issue, then we would have to go into what the measure of damages would be if there was not a free market and that presents the problem
96 which Mr. Williams has referred to as to what the measure would be. It seems to me that this is really not cross-examination of this witness. For that reason I think I will exclude it without passing upon the other question involved until we come to it. In other words, the proper cross-examination of this witness is

along the lines of his direct examination. He has testified as to the market price of spot coal and as to that you can cross-examine him. As to what the market price was of contract coal he has testified nothing with respect to it. So it seems to me to be an abuse of cross-examination to go into that problem.

Mr. PEARSE. I might say further at this time; I will not argue any further on this point, but simply to clear up the situation. I do not apprehend that the issue in this case is going to be limited by any, what we might call, tricks of pleadings. It has already appeared by the testimony of this witness that there were written orders from the Navy Department requisitioning this coal and so far as our admissions go in the pleadings I do not comprehend that they go further than to admit first that the coal was requisitioned in a lawful manner by the Navy Department, and second that the coal was actually taken on those particular dates. Now, that is as far as our admission goes.

We intend to show, if the plaintiff does not show it himself, that this coal was ordered and requisitioned long before it was ever delivered.

The COURT. That is a problem that has bothered me a great deal. Mr. Pearse. The statute gives you the right to take immediately.

Mr. PEARSE. No; from time to time—requisition from time to time.

The COURT. From time to time. But it is for an immediate
97 taking. The statute does not contemplate that you should say to a man, "I am going to take your coal a year hence or two years hence or three years hence." It contemplates that you should take it for the immediate necessities of the Government. That is the whole idea of the commandeering statute, that you step right in and say, "We want this coal, we will take it, we need it this minute." It is not that you should substitute commandeering as a method of acquiring that which you could have acquired by contract.

Mr. PEARSE. That may be true—

The COURT. The Government necessarily must be a favored suitor, but it cannot be a favored suitor to the extent of substituting its own methods for the acquiring of property of others except within the strict meaning of the statutes of Congress which enable it to take. Now, Congress was not contemplating that the commandeering statute should be a complete substitute for the Government acquiring that which it required in its ordinary course of business. It was simply an emergency method by which they could take that which they needed for immediate use, but it did not contemplate that they should substitute that method for all of the law of contracts, and the receiving of bids for the furnishing of supplies, or an acceptance of bids.

Mr. PEARSE. Of course, there, that is very true, but there was more than one reason, of course, for the passage of this act or the various acts which authorized that, and, of course, one of the reasons was so that the Government would not be called upon to

pay exorbitant prices for the supplies which were necessary for the maintaining and the establishment of the Army and the Navy, and that, of course, was one of the controlling reasons why Congress passed this Lever Act. I say that if our requisitioning orders
98 extended over an unreasonable period then there might be something said as to the validity of those orders. But we will show, and it can easily be shown, that there were four reasonable periods that this company, for instance, and forty or fifty other companies were told that for the following three months, we will say, they would be called upon to supply 5,000 tons of coal each, and that I apprehend being a fact we will not be limited in our proof of that by the suggestion made yesterday that the pleadings admitted an immediate seizure and an immediate delivery. Anyway, that is beside the question at this time.

The COURT. I don't know, but it occurs to me that even though the fact exists that it has nothing to do with an immediate seizure; that the right to take or the right to take as of that minute, and because they gave warning as to what they were to do cannot be a basis upon which the Government can predicate any legal right.

Mr. PEARSE. No; except this—

The COURT. That is its right to this coal either arose from contract or it arose from commandeering. Now, because it gave warning, because it told what it was likely to do, cannot be a basis for giving rise to any superior rights.

Mr. PEARSE. I do not think so, except in this way, that the plaintiff cannot say that by reason of the immediate taking by the Government of this coal at tidewater they were deprived of an opportunity of selling the coal at these high prices for export use.

The COURT. No; it is not that. It is fixing the reasonable value, the just value of that coal as of the time it was taken. And what is the criterion there? The market, or something in the clouds?

Now, you ask twelve men to say what the value of that coal
99 was and the testimony may show that it had as of the date it was taken a certain market value. Now, I am assuming that. What are those twelve men going to give? What are they going to say was the value of that coal? The fair market value of that date, or are they going to say it was something entirely different? Now, I should say offhand that it was almost a question for the court that if there was a fair market value which was proved that that was the criterion as to damages. In dealing with coal you are dealing with something that is concrete; you are dealing with something that is used and consumed all over the country, something that this man or that man or the other man is willing to pay a price for. In other words, I do not believe that the Lever Act and the commandeering provisions of it were intended as a substitute for the activity of the Government in contracting for that which it needed at reasonable prices. If it did not contract for what it needed at reasonable prices then it was up against the same situation as a business man who does not do it. It could take. A

business man could not take; he would have to close up shop. The Government could take it so that they could run this war. Congress intended that it should run this war; it was necessary that it should. But it was not necessary for it to lay idly by and say, "We are not going to do this, we can come around and get it at any price we want." The very purpose of the statute was to take, but when you take in this way, you have got to take it at what is a market, if there is a free market.

Mr. PEARSE. Of course, and here again I am anticipating the defense, in answering your honor, and that is that we expect to show that while the Government advertised for bids, sufficient bids
100 were not received to cover the amount required and that was the only legal method by which the Government—

The COURT. That is unfortunate. Congress has a remedy at hand. But there is no reason why this coal mining company should lose its property rather than some other coal mining company, and so if it does lose its property it has a right to receive that sum of money which it could get in the open market from John Smith, Bill Jones, or somebody else.

Mr. PEARSE. Of course, that will be on the assumption that this company was picked out to supply the Government and the other companies were left out. As a matter of fact, this quantity of coal was allocated over all of the companies in that field.

The COURT. No; I think it is predicated on the Fourth or Fifth Amendment, whichever it is—the Fifth Amendment. I think it is predicated on the Fifth Amendment of the Constitution. I think they had just this situation in mind when they put that in, that no one should be deprived of his property without just compensation, knowing that the Government could take, but when they did take it should give that which was its value, because if they did not do that great hardship might be worked by the Government taking John Smith's property and not taking William Jones' property.

Mr. PEARSE. Well, I do not understand that it is an answer to any particular objection—

The COURT. No; it is only that we understand ourselves better, and I am going to exclude for the present all that with respect to contract coal.

Now, as to the defense of the action we will take a ruling on that when we come to it.

101 By Mr. PEARSE:

Q. You say that approximately 600,000 tons was exported, spot, exported; is that it?

A. No, sir; I did not say that.

Q. Well, then, perhaps I do not recollect at this time exactly what figures you gave, Mr. Carpenter.

A. I said approximately 600,000 tons was exported and furnished for bunkers both under spot and contract.

Q. I see. What proportion of it was spot and what proportion of it was contract?

A. About 268,000 tons of it, gross tons, was spot coal.

Q. Yes.

A. Please do not get mixed up, you know. There is a reduction as between net and gross all the time. When we speak of f. o. b. mines it usually is on a net-ton basis. When you speak of Hampton Roads, tidewater, it is on a gross-ton basis. So all the tidewater coal is figured on gross tons until it gets back to the mine and then we reduce it to net tons to figure against our production of coal which is bought on a net-ton basis.

Q. But for the purpose of price and for the purpose of discussion here I understand gross tons is the correct quantity?

A. Yes; that is correct.

Q. You say that that quantity was both export and contract. Now, what became of the rest of the coal?

A. As I said to you before, there was 33 per cent spot, about 36 per cent of contract, export, and bunkers, and that would leave about 30 per cent coastwise and inland.

Q. And the prices which you have given are for this spot coal for export use and, as I take it from what you said yesterday, they are the very highest prices?

A. What prices are you talking about now, please—the prices of the claim against the Government?

Q. Yes.

A. That is what I consider a fair market price at the date of seizure.

Q. Outside of what you consider, is it not a fact that the prices which you have quoted and which you say you consider to be the fair market price was the highest prices that could be obtained for export spot coal during those periods?

A. No, sir.

Q. All right; now were there any higher prices?

A. If you will look over my list there you will find higher prices.

Q. Have you got your schedule, Exhibit 1, there?

A. I have.

Q. Just point it out, will you, please.

A. I refer you to October 18, \$6.23. I think my list calls for \$5.

Q. So that while export spot prices was \$6.23 you are only asking from the Government as just compensation \$5 a ton on that day?

A. I am not saying that. I am saying that I sold coal at that price on that date, but I consider that I have sold it higher than the market price, and later on you will find where I sold coal less than the market price—I beg pardon, you will find that in January and December that my prices are less than the market prices; less than what coal was sold at.

Q. Is that 1919 and 1920?

A. 1920 and 1921, the latter part.

Q. Now, the drop in prices started in the month of November, did it not?

A. For instance—yes, about the middle. For instance, in August; I sold coal on the 25th of August for \$17.69 and I said that the fair market price was \$16.

Q. That is what you call a speculative market, is it not?

A. I would not so consider it; the supply and demand caused the market price.

Q. You said yesterday that one of the reasons for the high prices was the demand for coal abroad; one on account of the conditions inland and I have forgotten what the other is.

A. I think my counsel mentioned that in his argument; I do not think I mentioned it.

Q. Well, both of you seem to be so well informed on the subject that I take it for granted that that is the fact. Anyway, that was one of the reasons, was it not?

A. Yes; that was one of the reasons.

103 Q. And is it not a fact that the reason for these high prices at various times in this period was because of the congestion of ships at Hampton Roads and other places?

A. No, sir; that was not the reason. The congestion of ships was caused by congestion of railroad transportation.

Q. And the longer the ship waited the higher the demurrage had to be paid?

A. I presume that they accrued the demurrage.

Q. And for that reason the ships were willing to pay almost any price to get coal?

A. I would not say the ships were willing to do that. The charterer of the cargo would bid on the market for coal at the market price.

Q. Because it was cheaper to pay a high price for coal than to pay demurrage?

A. I do not know what was running through the minds of the shippers.

Q. Anyway, that was the situation, was it not?

A. Sometimes it is cheaper to pay demurrage than to pay the high price for coal.

Q. But is not that the fact, that that was one of the reasons for the high price of coal at this particular period?

A. It might have been one of the factors.

Q. Well, if it were for the fact that there were a quantity of ships in the harbor awaiting coal high prices would not obtain, would they?

A. I do not know that that necessarily would govern it; I think the price of coal was predicated more on the transportation than anything else, the railroad transportation.

The Court. Overproduction of the other commodities.

Q. But there was no overproduction of coal, was there?

A. Well, at times there was.

Q. During this period?

A. The capacity of the mines was far beyond the car supply. They could have produced twice as much coal as the car supply would permit.

104 By the COURT:

Q. In other words, transportation and the use of the thing are factors which determine the market?

A. Yes.

Q. Supply and demand?

A. Yes.

Q. Supply and demand plus transportation?

A. Yes.

By Mr. PEARSE:

Q. Now, this pool which you have spoken of as Pool #1, that as a matter of fact maintained a quantity of coal at tidewater awaiting these very circumstances, did it not, so that you would be able to take advantage of the situation?

A. But it did not at all times maintain that because the railroads were not able to get the coal in. During the switchmen's strike the Virginia railroad was so affected that the road was lined with coal, they could not move it.

Q. And therefore that is one of the reasons why there was such a tremendous difference between the price of export coal and the price of coal for domestic use?

A. I beg pardon. New England paid almost as much for coal at Hampton Roads as was charged for export and bunkers. Please do not confuse all-rail coal inland with coal shipped to tidewater for transshipment.

Q. You say that these prices which you have given are in your opinion the fair market value of the coal. What is the figure in the month of April, 1919?

A. \$6.50-\$8.50 Hampton Roads.

Q. Now, is it not a fact that while you have given that figure and were able to sell coal at that time for export there were other coal miners from the same region that month that were selling coal for export use at \$3.25 f. o. b. mines?

A. Did you ask me that question?

Q. Yes.

A. Well, I don't think I can answer that; you put it in my mouth.

You say that I said that, don't you?

105 By the COURT:

Q. No, no; he is asking you if that is a fact, or if you know that to be a fact?

A. I do not know that to be a fact.

By Mr. PEARSE:

Q. You are generally familiar, are you not, with the coal market?

A. Yes. I do not know of anyone that sold coal at that price at that time on this spot market.

Q. Are you acquainted with Colonel Wentz?

A. I have not the pleasure of the gentleman's acquaintance.

Q. You know him, don't you?

A. I know of him, yes.

Q. He is president of the National Coal Association, is he not?

A. I do not know whether at that date he was or not; he was later on.

Q. Would you have any confidence in a statement made by him as to what the price was?

A. Well, from what I read of what he said in the papers, I do not think I would have very much confidence in him.

Q. He is a coal man, president of the National Association?

A. That does not always indicate that he knows the coal business.

Q. Then if any such statement was made by him you think it is probably incorrect?

A. I would not say that.

Q. You would not say that?

A. I don't know; I might have my own opinion about it.

Q. But so far as you are personally concerned your knowledge of the market did not lead you to discover that fact, if it is a fact, that coal for export use in the month of April, 1920, was sold at the rate of \$3.25 f. o. b.?

Mr. WILLIAMS. You do not say whether it was contract or export spot.

Mr. PEARSE. Spot.

A. I do not believe it to be so. I would like to say that that coal was shipped in April at \$3.25—you mean gross tons at the mines or net tons at the mines.

106 Q. That will only make it a difference of 12 per cent.

A. Well, it makes quite a difference, if you please, 12 per cent of \$3.25 is something like forty cents additional.

Q. Well, I take it that as he is speaking of Hampton Roads he is referring to gross tons.

A. I do not believe that any coal was sold on spot at that price.

Q. You have quoted the month of May, 1920, on the 12th, I believe, \$9.09, and on the 26th, \$10.44. Did you hear in your information which you obtained with reference to the coal market at that time that spot coal was sold for export use in that month, several hundred thousand tons, at the rate of \$4.50 to \$4.75 f. o. b. mines?

Mr. WILLIAMS. Spot or contract?

Mr. PEARSE. I said spot.

A. No, sir; I don't believe that.

Q. Then if Colonel Wentz said that he had sold that quantity himself, you would not believe it?

A. I would want to see the evidence of the shipment.

Q. Now, as a matter of fact, when you speak of the export business, of course we are referring to what is known as substantial export business, not speculative business, is it not a fact that under ordinary conditions that the export trade is done on a basis of probably fifty cents to a dollar higher than domestic trade?

Mr. WILLIAMS. That is objected to, if your honor please. We are entitled under the cases to the price which we can obtain for the best use of our product, the best available use. That is what the cases state. The coal was there at Hampton Roads. The testimony of the witness is that it was available for export; there was an export demand. If there was an export demand at those prices the export prices would govern.

The COURT. I do not think that was the purpose of Mr. Pearse's question, as I take it. He wants a comparison between the
107 export and the domestic price; that is, that there was a difference of fifty cents.

Mr. PEARSE. I am speaking of spot coal.

The COURT. Speaking of spot coal, and I do not know what the purpose of that question is, but just going into the elements that go to make up the market.

Mr. WILLIAMS. I am entirely agreeable, if the court please; afterwards it will be the court's duty, of course, to instruct the jury as to the measure.

(Question repeated.)

A. You are speaking of brokerage business now, are you not? We are not brokers.

Q. I mean the price of coal per ton.

A. No.

Q. Under the ordinary circumstances?

A. No; we tried to get the market price for it.

Q. What was the variation, for instance, in the month of May, 1920, between the price of coal for export use, spot coal, and the same character of coal for domestic use?

A. I was not in the domestic business; I don't know.

Q. I understood you to say 30 per cent of your business.

A. I told you to please not mix up all-rail business and coastwise and that class of business together, because it is entirely different.

Q. Are you not familiar with the domestic prices?

A. We do not do New England business. We keep no track of that market at all.

Q. Then, as a matter of fact, you are not familiar with the coal market generally?

A. Not with the inland market.

Q. You only—

A. Just a minute, please; not with the inland market or New England, because I have nothing to do with that.

Q. And practically then your accurate information on the
108 subject of market value is limited to the spot market for export use; is that so?

A. The spot market and inland all-rail market.

Q. What was the difference between the price of spot coal in the month of May, export, and, what do you call it—inland rail market?

A. Yes; I will answer that question by saying that the domestic consumers, suppliers, generally, did not charge their trade, their old trade, more than a reasonable—I would not say a reasonable price, but a much lower price than we were getting for export.

Q. That is, that while the price for domestic was lower than the export price it was the price which yielded the coal company a profit?

Mr. WILLIAMS. I object to that. I do not think the question is proper.

The COURT. I do not see how the question is proper, Mr. Pearse.

Mr. PEARSE. Well, perhaps I was unskillful in framing my question.

The COURT. I understood you were trying to find out whether there was a factor of fifty cents in the variance between the domestic and import coal.

Mr. PEARSE. In an ordinary market.

The COURT. Now, as a coal man, would you say that there was that factor of fifty cents difference between export and domestic in use in the coal market; did you ever hear of it?

The WITNESS. Judge, it varies very materially.

By Mr. PEARSE:

Q. Between fifty cents and a dollar?

A. It might be up to \$1.50. For instance, the United States Fuel Administrator acknowledged \$1.50 difference between inland and export in his price of \$4.53. He acknowledges \$1.50.

By the COURT:

Q. Then there is no definite factor of variation?

A. No, sir.

109 Q. Either fifty cents or \$1.50 or \$1.00; it varies as circumstances arise?

A. As conditions arise.

By Mr. PEARSE.

Q. All right. Then what, in your experience in ordinary times, would be the limit of variation between export and domestic trade?

A. What do you mean by—

Mr. WILLIAMS. Are we interested in ordinary times or ideal times?

Mr. PEARSE. Do you object to the question?

Mr. WILLIAMS. I object.

The COURT. Objection sustained.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. s.]

Q. I believe in the month of August, 1920, you charged \$16 a ton?

A. Yes.

Q. Now, while it might be a fact that in that particular month you were able to sell to some persons coal at that high figure, that, however, was not the average market price, was it?

A. I should say that the market price, the average market price of that month was higher.

Q. How much higher?

A. By one dollar a ton.

Q. Then if Colonel Wentz should have said that he heard of it being offered at high as \$16 or \$17 a ton f. o. b. tidewater, isolated cases, and that that was not the average market price, he would be mistaken, would he?

Mr. WILLIAMS. I object to that. It seems to me, if the court please, that this way of getting in Colonel Wentz's alleged testimony is not proper cross-examination.

Mr. PEARSE. Do not say alleged testimony.

Mr. WILLIAMS. I do not know anything about it.

110 Mr. PEARSE. You ought to know.

The COURT. I don't know, but it seems to me that unless Colonel Wentz is a witness here, that the statements of Colonel Wentz are of no greater probative force than the statement of anybody that might be made out on the curb.

Mr. PEARSE. My answer to that, sir, is this, that by the witness himself, of course, by my question it appears who Colonel Wentz is; that he is a coal man and that necessarily by reason of his position he must know something about the price of coal, and Mr. Carpenter has come here and has testified, and he has expert knowledge—I assume that he will agree with me that Colonel Wentz has some expert knowledge—and if he said something different from what Mr. Carpenter is saying it is perfectly legitimate cross-examination.

Mr. WILLIAMS. I object, if the Court please, to this method of attempting to get before the jury the testimony which he could not offer to the jury. It is clearly improper. If Colonel Wentz is called here we have an opportunity to cross-examine him, to see what he knows about it.

The COURT. Objection sustained.

Government's counsel prays an exception which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. s.]

Q. Now, the conditions in the month of August, 1920, or the situation, rather, and the time I speak of was the time when coal was at its peak, was a speculative situation, was it not?

A. No, sir.

Q. Were not steps being taken by you coal operators at that time to remedy the situation there so as to bring down the price?

111 A. What do you mean by "you coal operators"? We do business by ourselves; we do not associate with other operators in our business.

Q. You have nothing to do with the other coal operators?

A. We do not belong to any association.

By the COURT:

Q. If you did you would become criminals, would you not?

A. That is what we tried to sidestep. I beg pardon, we were members of the National Coal Association, but never took any part in their proceedings at all and later resigned.

By Mr. PEARSE:

Q. It is the National Coal Association that I am talking about. Don't you know as a matter of fact that there were steps taken by that association to remedy this situation which we are speaking about?

A. What do you mean by remedy, if you please?

Q. Bring down the price of coal from the high speculative values.

A. How could they remedy supply and demand?

Q. I do not know how they could do it, but is it not a fact, Mr. Carpenter, that by reason of their efforts the price of coal in two months later came down?

A. Absolutely no.

Q. Do you know that as a fact?

A. I beg pardon; do I know it?

Q. Yes.

The COURT. We are getting outside of the realm of probative proof. The price came down. As to what caused the price to come down is purely speculative.

Mr. PEARSE. Well, the price going up is purely speculative, too. We are trying to show there was not a market.

The WITNESS. I deny that; I say it is supply and demand.

112 Mr. WILLIAMS. My friend said coal was at its peak.

Mr. PEARSE. I saw you laugh at that suggestion; I did not know where the joke came in.

Mr. WILLIAMS. How can there be a peak unless there is a market price for it?

Mr. PEARSE. Then it is top price, that is all.

Redirect examination by Mr. WILLIAMS:

Q. Mr. Carpenter, just a moment, please. You have spoken about the demand for export during this period. I would like you to be clear about that as to whether you know whether or not there was an additional demand for export which would have taken care of this coal which was commandeered by the Government?

A. It certainly did.

Q. Was there such a demand?

A. There were buyers in the market every day in the month—H. Allen Miller and the Coal Trade Association; Curry Brothers, Limited; Mann-McNeil and Cobb, of London; I could continue that.

Q. Did some of these people come over and open offices for the purpose of buying coal for export?

A. All those that I mentioned opened offices in New York for that purpose.

Q. You have mentioned these prices as prices f. o. b. mines. Now, the coal, as I understand it, was at Hampton Roads, and when you name a price f. o. b. mines it is because the one who bought or took that coal was obliged to pay the freight in order to get it out of the pool; is that correct?

A. That is correct.

Q. So really your price is f. o. b. Hampton Roads, subject to the payment of the freight from the New River Coal Company?

A. That is correct, sir.

The COURT. Now, when the Government took this coal, did it pay the freight?

113 Mr. WILLIAMS. Yes, sir; it had to pay the freight in order to get it out of the pool, as I understand it.

The COURT. The railroad, in other words, had a lien?

Mr. WILLIAMS. Yes, sir.

By Mr. WILLIAMS:

Q. When these shipments were made to Hampton Roads, Mr. Carpenter, did you have charterers in all cases ready for reshipment or not?

A. I would like to explain this, that a coal producer usually making these contracts figures on what the car supply is going to be. Well, if it so happens he gets a larger supply than he figured on he will have some free coal. In another case we sell coal on a certain contract. The steamer is located to arrive on a certain day in a certain month. By storms it is delayed on its route and it may be seven days late. Well, a cargo is at the port provided and by a seven days' delay in the vessel you have time to reship from the mines, consequently you sell the coal in order to relieve the cars and to take advantage of the spot market.

Q. And those were the spot sales you mentioned?

A. Yes, sir.

Q. During the period of price fixing which you have referred to from December 1, 1919, to March 4, 1920, as I have it here, what price did you receive for your bunker coal at Hampton Roads?

A. The Government price.

Q. Which Government price?

A. The export price, the \$1.50—

Q. The same price as for export?

A. Yes.

Q. In other words, the price which you have charged here of \$4.536?

A. Yes. That figures at \$6.596 at Hampton Roads. Doctor Garfield said that vessels taking bunkers should be considered the same as export coal as they were at that time largely foreign vessels and then when it came along when the United States merchant marine,

114 it was ruled that those vessels were going to foreign ports and they should be considered the same as export.

Q. During that period of three or four months of price-fixing, would you say that there was a demand which you know of and which would have taken care of this coal which was commandeered during this period?

A. Yes.

Q. For export?

A. Yes.

Q. Or for bunkers?

A. Yes.

Recross-examination by Mr. PEARSE:

Q. Well, along that line, Mr. Carpenter, can you tell us of any customers that you lost by reason of the fact that you were called upon to supply the Navy with coal?

A. During what period?

Q. Any of the period?

A. Yes; I can tell you a case.

Q. Any sales you could have made?

The COURT. How is that relevant?

Q. Any sales which you could have made?

A. Shall I answer that?

The COURT. You can unless Mr. Williams objects.

The WITNESS. You want me to name the customers. I will tell you a case where two vessels were standing in the harbor at Hampton Roads and the cargo was there and the United States Government came in and took the coal and we have claims to-day for \$23,000 demurrage on those two vessels that are being tried and we are resisting them on account of the *force majeure* that was exercised to take the coal.

Q. And those were vessels with whom you had contracts?

A. I did not say that. They might have been spot sales; I cannot say that.

Q. How could there be any charge for demurrage on the spot sales; you are not under any obligation—

A. It depends on the charter. We might have chartered to
115 sell C. I. F. We might have had a cable and chartered a boat on that day and sold the cargo C. I. P.

Q. Did you; was that this case?

A. I cannot tell you offhand.

Q. Is that this case which you are speaking about?

A. I don't know without looking at it. I know we got \$23,000 demurrage staring us in the face.

Q. You have not paid it yet?

A. We do not hope to.

J. L. MOON, called as a witness in behalf of the plaintiff, being first duly sworn, testifies as follows:

Direct examination by Mr. WILLIAMS:

Q. Mr. Moon, where do you live?

A. Richmond, Virginia.

Q. What is your business?

A. General manager of the West Virginia Coal Company.

Q. How long have you been in the coal business?

A. Actively for twelve years.

Q. Were you in that business during the period which is now in question which you have heard about in this case?

A. I was.

Q. Were you familiar during that period with the market for New River coal of the kind that has been described for Navy use?

A. I was.

Q. Will you tell the jury the extent of your familiarity and whether there was a market and what the market prices were?

A. I am a member of this company, whose living is made by selling coal, and unless we kept posted in the market we could not sell; unless we sold we would starve.

Q. Did you in fact familiarize yourself with the market in this way?

A. I did.

Q. Did you have transactions on the market during this period?

A. I did.

Q. To what extent did you buy and sell coal yourself during this period?

116 A. We handled approximately a million tons per year; one or two years handled more than that, but in the year 1920 we handled rather less than one million. Now, at New River, Pocahontas, and high volatile coals handled from Hampton Roads, which supplanted New River at times—

By the Court:

Q. You shipped your coal in pool 1?

A. In part. We ship through various pools—1, 2, 5, 6, and 7.

Q. You did ship a great deal in pool 1 to Hampton Roads during this period from September, 1919, to January of 1920, inclusive?

A. That is right.

Q. You knew the value of New River coal at Hampton Roads for export purposes?

A. That is right.

Q. During that period?

A. I did.

Q. You, as sales manager, kept closely in touch with the market?

A. I did.

Q. There was a market?

A. There was.

Q. And the market price varied from time to time during the period?

A. It did.

Q. Will you tell us what the market prices were during that period from September, 1919, to January 18, 1921:

A. They varied—

Q. I notice that you have a paper in your hand. Does that contain data made by you with respect to the market price of New River coal during the period that I referred to?

A. It does.

Q. How did you make up that data?

A. From our sales and from data we keep currently as to what the market conditions are.

Q. I see; from your actual sales and from information which you obtain with respect to the actual sales?

A. That is right.

The COURT. Mr. Pearse, have you any objection to the paper going in as an exhibit?

The WITNESS. It is not written in very legible form for an exhibit; it is only written for a memorandum for my personal information to help me recall.

Mr. PEARSE. I do not want to go into a lot of detailed figures; if I say yes to that I may be sorry later. I do not know what is in the paper.

Mr. WILLIAMS. I offer the witness for cross-examination on the subject to his competency.

By Mr. WILLIAMS:

Q. You are familiar with the prices which are claimed by the plaintiff here in his bill of particulars and with the testimony of Mr. Carpenter as to market prices on those various dates. I ask you whether those prices on the respective dates are in your judgment fair market prices?

A. As a whole I think they are. There are some little variations. Now he shows the price in August of \$6; I think that is too low.

Q. What is your objection as to the price in August?

A. \$1 to \$1.50 higher.

Q. Are there any other prices which you wish to qualify in the same way; are there any prices which are too high in your judgment?

A. He shows as of June 2nd a price of \$11; I think that is a little high—fifty cents to a dollar.

By the COURT:

Q. That is June what?

A. June 2nd. The market was rising, but I do not think on June 2nd or 3rd it had reached that high price.

Q. That is, you would say the price was somewhere between \$10 and \$11?

A. Between \$10 and \$10.50. And in January, 1921, he shows the price of \$5.

Q. January, 1921?

A. He shows the price of \$4.70. Now I think that is too low.

118 By Mr. WILLIAMS:

Q. What is your judgment as to the price?

A. \$5 to \$25.

Q. Those are all prices at Hampton Roads, subject to the payment of freight by the buyer or the taker?

A. Yes.

Q. And under the conditions which you have heard testified about by Mr. Carpenter?

A. That is right.

Q. You were buying and selling coal during all this time?

A. Yes.

Q. Making your living by doing it?

A. Yes.

Cross-examination by Mr. PEARSE:

Q. I presume, Mr. Moon, that the figures which you are testifying to represent prices which you know at which coal was sold on those particular dates?

A. Yes.

Q. As a matter of fact, your table would show that there was a variation, a rapid variation, in prices from day to day, would it not?

A. There were variations; I do not know whether they were rapid.

Q. Well, in the coal business, in which you say you have been engaged for a period of twelve years, have you ever known of a period when prices of coal changed so rapidly within the same period of time?

Mr. WILLIAMS. I object to that as entirely irrelevant. We may have a very active market on the stock market, but if you fail to deliver the stock on that day you have to pay on that basis. You may have a very active market somewhere else, but if you fail to deliver on that day you have to pay that market.

Mr. PEARSE. It is your contention then that a market of that kind is a fair market?

Mr. WILLIAMS. The only possible measure of damages as between citizens or as between a Government and the citizens as to
119 what a thing is worth is what you can get for it for gold dollars during that time.

The COURT. The objection is well taken; I will allow an exception.

Government's counsel prays an exception which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. a.]

Q. You say that you thought that Mr. Carpenter was a little low in August?

A. I did.

Q. Why do you say that the price should be \$17?

A. I made sales at \$17.50; I know of others who made them at a higher price.

Q. On the same day?

A. Mr. Carpenter's record shows that his scale was \$16, or his delivery was \$16, was made on August 3rd. On July 25th I sold at \$16.50. On August 5th I sold at \$17.50. They are the nearest dates I have to his date mentioned in August.

Q. Well, there was coal sold on that day by other dealers as high as \$20 a ton, was there not?

A. I am not prepared to say as to that.

Q. Around that period as high as \$24 a ton?

A. I did not hear of any such sales.

Q. What is the highest that you heard?

A. Approximately \$21.

Q. Do you know the reason for such high prices, taking you out of the starvation period which you referred to?

A. We know of two laws, the laws of supply and demand, and the law of gravity.

Q. That is your opinion, then, that you think is what established this situation. As a matter of fact transportation was all tied up, was it not?

A. No; not all tied up.

Q. Was there any free flow of coal at this particular time from the mines to tidewater?

120

By the COURT:

Q. You are not a railroad man; you do not know what the railroads were doing with their cars, do you?

A. I know the reports as they are compiled daily at the various Hampton Roads ports showing what coal is dumped. They can only dump into vessels what coal they move. In August, 1920, at Newport News there was dumped 690,000 tons of coal, one of the largest months in the history of the railroad.

At Sewall's Point the Virginia Railroad terminal, August, 1920, there was 524,000 tons reported dumped, another large month, practically the largest in the history of the railroad.

At Lambert's Point, the Norfolk & Western terminal, there was dumped in August, 1920, 857,000 tons or 6,000 tons less than the heaviest month in the history of the railroad, July, 1920, being credited as the heaviest month.

By Mr. PEARSE:

Q. And still there was not sufficient coal to supply the demand?

A. I know of no plant that was shut down; I know of no ship that left Hampton Roads without coal that wanted it.

Q. Therefore, in your opinion, the transportation facilities were normal, and was flourishing, and there was plenty of coal and plenty of ships to take the coal?

A. You go right fast for me. In part you are correct; in part I do not think you are.

Q. In which part am I not correct?

A. You say the transportation was normal. The transportation to Hampton Roads in the month of August was normal or a little better than normal from the tonnage figures.

Q. How about July?

A. July was the heaviest month that was ever recorded for Lambert's Point of the Norfolk & Western terminal.

121 For Sewalls Point it was 579,000 tons, which was much better than normal; in fact, a great deal better than normal.

Newport News was 690,000 tons, which was considerably above normal. So much for transportation to those points.

Now, your other three items I did not catch; I did not follow you. You say business was flourishing was one of them?

Q. Yes; plenty of ships and plenty of coal.

A. To move a great deal of tonnage; yes.

Q. No ships were delayed in the harbor by reason of the insufficiency of the supply of coal?

A. Yes; I think there were.

Q. Therefore, one of the reasons for the demand for coal was the number of ships in the harbor awaiting it?

A. No; the demand for coal was strong. That is what increased the price, I think.

Q. And that is the demand for export use?

A. That is right.

Q. Your company is not a mining company, is it?

A. In a very limited way.

Q. Do you operate any mines?

A. At present one, of a limited output.

Q. In the New River district?

A. In the New River district.

Q. These figures which you have stated, are they in your opinion representative of the price which all of the coal operators in that region were receiving for export spot coal?

A. Now, all with the possible exception of a few. I will mention Mr. Berwind, for instance, who probably had some ulterior motives in selling his coal below the market.

Q. Ulterior motive?

A. Yes.

By the COURT:

Q. Is that Berwind-White Company?

A. Yes.

122

By Mr. PEARSE:

Q. That is one of the largest coal-mining companies in the country, is it not?

A. Yes; it is credited to be.

Q. And they sold below the market?

A. Yes.

By the COURT:

Q. You don't know what his motive was in selling below?

A. I have an idea in my mind, but I do not know; I can not read his mind.

By Mr. PEARSE:

Q. Anyone else?

A. Colonel Wentz, to whom you referred recently, is credited with having sold coal below the current market, but I do not know as you can consider that in connection with the New River coal, Navy standard, which you are considering at present. As I understand it, Colonel Wentz's coal does not by any means measure up to the Navy specifications.

Q. Do you know that as a fact?

A. I have never analyzed his coal. The Government reports will bear me out.

Q. Then you are speaking of what you have heard then rather than what you know?

A. I am speaking of information I obtained from Government reports and what is commonly known in the trade.

Q. Do you know of anyone else?

A. I don't recall them at present.

Q. There were others?

A. Not to my knowledge at this time.

Q. And the statistics which you have compiled with respect to prices are based upon what your company sold

* * * *

and agents for those operators we bought coal, several lots of coal for the Shipping Board vessels.

Q. During those two months?

A. In June and July, 1920.

Q. Just give us those sales, Mr. Moon.

123 Mr. PEARSE. If your honor please, I object to that question.

What particular difference does it make whether it is the Shipping Board or somebody else. Why should this be picked out as the criterion, this particular transaction?

Mr. WILLIAMS. It has a bearing on the prices.

Mr. PEARSE. To show it is a general market.

Mr. WILLIAMS. The best evidence of a market is the actual sales, especially actual sales to the Government, when you are contending here that they are not market prices; it is one Government indivisible—

The COURT. Let us have it.

Mr. PEARSE. Exception.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. S.]

A. On July 15th, the Government steamer "West Alseck," 1,935 gross tons at \$18 a gross ton f. o. b. piers, which would figure back in round figures \$16 at the mines gross tons.

On July 6th, 1,207 gross tons for the S. S. "Tenafly," \$17.25 at Hampton Roads, which would figure back \$15.25 a gross ton at the mines.

By Mr. PEARSE:

Q. What date was that?

A. July 6th to 9th, I am not sure which it was.

By the COURT:

Q. How about in August?

A. There is none recorded in August. There is one in January, 1921, of \$7.60, which would figure back to \$4.80.

124 The COURT. Any further questions, Mr. Pearse?

Mr. PEARSE. Yes.

By Mr. PEARSE:

Q. From all of which it appears that there was one market for one purpose and another market for another purpose; is that true? Those are market prices I suppose you paid when you represented the Shipping Board?

A. Well, we drove a man down as hard as we could. We tried to buy from some man who could not sell it on a better market. In other words, he did not have enough to make up a cargo or did not fit in some place. You would send a man around to canvass the situation to see where you could drive the best bargain.

Q. So that while on that same day which you speak of between the 5th and the 9th of July, 1920, one man was paying \$11 a ton and another man was paying \$18 a ton and somebody else was paying some other price?

A. I don't know of any \$11 in July.

Q. July, 1920?

Mr. WILLIAMS. Where did you get your idea of \$11; where did you get that from?

Mr. PEARSE. Maybe I looked at the wrong place.

The COURT. On July 5th on Exhibit 1 there is a sale of 734 tons at \$11.

Mr. PEARSE. Yes; what is there wrong about that?

The COURT. That is what was testified to by Mr. Carpenter.

Mr. PEARSE. I understood Mr. Carpenter to say that on July 2, 1920, the market price of coal was \$11 a ton; is that right, or am I wrong?

Mr. WILLIAMS. That may have gotten into the wrong column, I don't know.

Q. What was the market price on July 2, 1920, not what you sold for the Shipping Board?

A. About \$13, probably a little higher; I would say \$13 to \$14.

125 Mr. WILLIAMS. Are you answering about July now? There was no commandeering in July.

The COURT. It is only to test the witness.

Q. You say, Mr. Moon, that on July 11th you bought for the account of the Shipping Board coal at \$18.35 a ton?

A. No; just a second, please.

Q. Is that right?

A. On July, when?

Q. July 11th.

A. I bought coal at what?

Q. \$18.35 a ton; was not that the date that you bought for the steamer "Alseck"?

A. July 15th, \$18 less the freight; or, in round figures, \$16.

Q. I see. Well, was that the price at which coal was selling at that date to other concerns or other shippers?

A. I bought what I thought was distress coal.

Q. Distress coal?

A. Yes; but it did not fit in. The man who sold it could not make up a cargo and he did not have it to fit into his tonnage he had there at port.

Q. And that is what fixed the price in your mind at that date as being the market price?

A. Not necessarily; it was not far from the market price.

Q. Going back again to this date of July 6th; that was at \$17.25 a ton?

A. Less freight.

Q. Less freight, \$2.20?

A. Yes.

Q. Getting it down to something over \$15 a ton?

A. That is right.

Q. Is that the price that other people were paying that day for coal?

A. Approximately.

Q. It is in evidence here from another witness that \$11 a ton was the market price that day; is that erroneous?

Mr. WILLIAMS. I object to that.

Mr. PEARSE. The exhibit is in evidence.

Mr. WILLIAMS. There is no evidence that that was the market price.

Mr. PEARSE. What is it, then?

The COURT. The exhibit shows that the market on June 3rd was \$11.

126 Mr. PEARSE. July 6th.

The COURT. There is nothing in evidence as to July 6th.

Mr. PEARSE. All right.

The COURT. And the other one shows July 6th to be \$11; that is correct. Now, the witness testifies that he purchased at \$16.

The WITNESS. Yes.

By the COURT:

Q. You think \$11 is low?

A. I do, for July 6th.

By Mr. PEARSE:

Q. Where one man is paying for coal or selling coal at approximately \$16 a ton, another man selling coal on the same day for \$11 a ton, do you think that there is any free market on that day at which you can fix in your opinion as an expert that there was a market price on that day for coal?

A. There was a market price on that day.

Q. What, in your opinion, was the market price on that date?

A. On what date?

Q. July 6, 1920.

A. Approximately \$15.

Q. Have you any other sales outside of those two?

A. The three I referred to.

Q. I did not hear the third one.

A. The third one was at a later date, January 12, 1921.

Q. Yes.

A. \$4.80.

Q. That was near the market, was it not?

A. Near the market; yes. I think it was low, but anyhow, we succeeded in picking up this little parcel of 659 tons.

Q. The opinion which you have expressed as to what the market was on these various dates which are in controversy, is that based on general statistics obtained or from isolated prices which were obtained on that date by your company and by the New River Collieries Company?

A. Was obtained by sales that were made on or about those
127 dates and my general knowledge of the market conditions which were obtained from time to time by close contact with the market. For example, we have an office at Newport News, at Norfolk, at Bluefields, and at Huntington. The duty of the managers of those several offices is to inform us daily as to the market and trade conditions; the Hampton Roads office, the Newport News, and Norfolk report daily by telephone.

Q. You said, however, that there were companies who were getting less prices than that for coal, and you mentioned the Berwind-White Company. Do you know what prices they were getting for spot coal in 1920?

A. They were credited by the trade with maintaining much lower prices than the general market price.

Q. \$4.31 a gross ton, was it not?

A. I don't know.

Q. You don't know?

A. No; I have never had access to Mr. Berwind's records.

Q. Are you acquainted with the Consolidated Coal Company?

A. In a general way. They are not active in the Hampton Roads market, and I know of no mines which they own or control shipping through Hampton Roads.

Q. They mine in the New River district, don't they?

A. Not to my knowledge.

Q. They are, however, engaged in the sale of bunker coal, are they not?

A. Probably at New York, Philadelphia, and Baltimore.

Q. Well, was there a variation in the price between those various points?

A. I do not consider myself qualified to answer as to market conditions other than in a general way at the northern ports.

GEORGE McBLAIR, called as a witness in behalf of the plaintiff, being first duly sworn, testifies as follows:

Direct examination by Mr. WILLIAMS:

Q. Mr. McBlair, where do you live?

A. New York City.

128 Q. What was your business during the period here under discussion?

A. Shipping business and coal business; the coal business principally.

Q. Were you in the market for New River coal for export?

A. Frequently.

Q. Were you familiar with the spot market on New River coal during this period?

A. Yes; I would say I was.

Q. Did you have transactions during that time to what extent?

A. My business, the coal business, was the purchasing of coal at tidewater and exporting that coal. In the conduct of that business it was of course necessary for me to keep in practically daily contact with the market at Hampton Roads.

Q. Were you familiar with the market on New River coal at Hampton Roads during this period?

A. I was.

Q. Was there a market?

A. There was, unquestionably.

Q. Are you familiar with the prices which have been testified to here and which are set forth in the plaintiff's bill of particulars on those various dates?

A. I have heard much of the testimony and I have seen one of the exhibits.

Q. I show you Exhibit No. 2. Have you seen the schedule of market prices, which is the fourth column on Exhibit No. 2?

A. Yes.

Q. You are familiar with those figures?

A. I am familiar with them particularly after March, 1920; I am not so familiar with the prices prior to that time; the Fuel Administrator was in control prior to that time.

Q. Now, in March, 1920, referring to those figures, will you please state whether in your judgment they are the fair market prices of this coal on the dates in question?

A. I would say that they did represent with a very fair degree of accuracy the prevailing market prices.

Q. Will you give us any exceptions which you wish to quote as to any prices which you think are at all out of line or should be lower or should be higher than those figures in your experience?

A. I personally secured from the books of my company a record of some purchases made by my company in Hampton Roads during the periods approximating the periods shown in the exhibits you have just shown me.

I find, for example, that in the exhibit you have shown me, that the price of \$9.30 under date of April 30th at tidewater; my price and my knowledge of prices, of course, is f. o. b. tidewater; I do not buy at the mines. My prices give me the price which I paid for a considerable quantity of coal at forty cents higher than that price on May 17th. The list of prices which I have secured from my book will simply serve as an indication of the market at the periods at which I purchased the coal and assist me in forming an intelligent idea as to the correctness of the exhibit which you have just shown me.

Q. Are there any other prices you want to especially comment upon, Mr. McBlair?

A. The prices on June 2nd and 3rd in the exhibit are the equivalent of \$13.80 at tidewater; the prices I paid for coal on June 18th and 25th were, respectively, \$15.50 and \$16.50.

On July 14th I paid \$17.75 at tidewater. The exhibit you have just shown me shows on September 15th a price of \$16.50.

On September 23rd I paid \$15.50; your exhibit shows on October 23rd \$16.50.

On October 9th I paid \$16.25. Your exhibit shows on November 5th a price of \$15.

By the Court:

Q. My exhibit shows a price of \$12.20.

A. Those prices, your honor, are all at tidewater. Of course, I do not pose as an expert on mine prices.

Your figure of November 5th was \$15. I paid on November 3rd \$15.50.

130 On November 11th I paid \$15.50. Your exhibit price on

November 23rd and the 25th is the equivalent of \$11.25 at tidewater. On November 17th I paid \$13; on the 18th \$13.25; and the 19th \$12.50.

On December 8th your exhibit shows a price of \$9.50 tidewater; December 6th I paid \$8.75.

Another price in your exhibit just about that time was \$7.50 and on December 28th I paid \$8.75.

On January 6th your exhibit shows \$7.50 and on January 12th I paid \$7.25.

On January 11th your price was \$7.50; on January 13th I paid \$8.40. That takes us up to the 13th of January; it shows the range of prices which I paid there.

By Mr. WILLIAMS:

Q. You were in the business of buying and selling coal for export?

A. Yes.

Cross-examination by Mr. PEARSE:

Q. What company are you connected with?

A. George McBlair & Company, 11 Broadway, New York.

Q. Are you what are known as selling agents or are you engaged as buyers of coal?

A. The definition of the term "selling agent" is agents for certain mines. We are not agents for any mines. We buy outright and sell, principally export and some domestic.

Q. What do you mean by export coal?

A. Coal for which we secure orders from foreign countries, and we purchase the coal at tidewater to the best advantage and by trying the market out very thoroughly and seeing from whom we could get it cheapest, and we charter our ships and buy our coal and ship it up.

Q. And therefore the price which you are willing to pay for coal is not guided by the price which you expect to receive for it on the other side? That is, you are not confined by the ultimate price you expect to receive for the coal after you have sold it to foreign countries?

131 A. Well, I don't know. Of course, I am governed to that extent, that if I sell for export and I find that I cannot buy the coal at Hampton Roads cheap enough in order to make a profit I might delay shipment until I can. My transactions are governed a great deal by the condition of the market at Hampton Roads whether the market is up or down.

By the COURT:

Q. You do not pay any more for it at Hampton Roads than you have to, do you?

A. Absolutely not; no, sir. Naturally it is money in my pocket to try the market out very thoroughly. During that period I was in practically daily contact with the market there by telephone and, of course, bought the coal at the very lowest figure I could.

By Mr. PEARSE:

Q. I understand that Berwind-White were selling below the market; what about that?

A. My information on that would be hearsay, your honor; just the gossip in the trade.

Q. Did you buy coal from Berwind-White; did you try?

A. No, sir; I could not buy coal from Berwind-White; I did not try to. My reason for not trying was that my understanding of Berwind-White's method of doing business was that they sold principally under long-term contracts on which their prices at Hampton Roads, of course, would be very low and, of course, this is just the gossip of the trade. I suppose that Berwind-White, maybe for reasons of their own, kept their prices down.

Q. Was that spot coal that Berwind-White was selling or contract coal that they were selling?

A. I think that practically all their sales were contract coal because if Berwind-White were selling spot coal down there I think it extremely improbable that I would not have bought some of it, because I bought from a good many firms.

132 By Mr. PEARSE:

Q. You don't know, as a matter of fact, that Berwind-White was not selling spot coal at \$4 and some cents a ton, do you, during this period?

A. Well, I scoured the market pretty regularly, and I have never purchased any from Berwind-White. I think if they were I unquestionably would because I paid cash for my coal.

Q. You only buy coal for export use and not for domestic use?

A. I buy it for both.

Q. What was the difference in the price of spot coal for domestic use and for foreign use at Hampton Roads?

A. None.

Q. None?

A. No; not with the coal I bought.

Q. Was that the usual situation in the coal trade?

Mr. WILLIAMS. I object to that.

The COURT. I do not see that it will harm you and I do not see that it would help the Government any.

Mr. WILLIAMS. I think it is irrelevant, if the court please.

The COURT. Do you insist upon it, Mr. Pearse?

Mr. PEARSE. I think it is most important in my view of this case that there was not a free market and not a fair market and to show what the proper condition ought to be in the market seems to me is perfectly relevant. He says there is no difference. Some of the

witnesses have testified there was a difference between the domestic and export markets. This witness now says there was no difference, all of which goes to show that there was not any market.

The WITNESS. My knowledge of the domestic market does not extend to the interior. I do not ship to the interior. I purchase at Hampton Roads for transportation by barges to New York.
133 and for that particular kind of domestic business there was no difference in the price.

By the COURT:

Q. Did any seller of coal ask you whether you were going to use it in New York or whether you were going to send it abroad?

A. Yes; they asked the question.

Q. Did they say that the price in New York was so much and that the price abroad was so much more?

A. I bought it at Hampton Roads and I barged it myself.

Q. I know, but did they say they have one price if you are going to sell it in New York and another price if you are going to sell it in China?

A. No.

By Mr. PEARSE:

Q. There was a difference in the price, though, was there not?

A. Well, I have just said that in my experience there was none. Of course I cannot contradict myself.

Q. Well, then, why were the questions asked——

The COURT. He says they were not asked.

Mr. PEARSE. I understood him to say he was asked whether coal was going abroad or to New York or to New England.

The WITNESS. I was asked that question, but sometimes I would answer it and sometimes I would not. When I did answer it, it made no difference in the price I had to pay.

JOSEPH R. ROUTTEN, called as a witness on behalf of the plaintiff, being first duly sworn, testifies as follows:

Direct examination by Mr. WILLIAMS:

Q. Mr. Routten, where do you live?

A. Norfolk, Virginia.

134 Q. What is your business?

A. At present I am tidewater agent for the Seymour Coal and Coke Company and also the New River Collieries Company.

Q. During the period in question, during the period from September 18, 1919, to January 18, 1921, what was your position?

A. I was connected with the firm of Ingallsby-Patterson Company, Incorporated; secretary and treasurer of that company.

Q. What was the business of that company?

A. They were brokers in coal and shipping. We were agents for a number of lines at Hampton Roads and also in the coal business, too, in the matter of purchasing and selling bunkers and cargo.

Q. What were your duties in connection with that company, especially with respect to New River coal?

A. Well, that coal, of course, was used for bunkers, as the Pocahontas coal was; it is practically the same grade, and they understand it, and we were called upon from time to time to purchase this coal for bunkers of vessels belonging to the lines that we represented at Hampton Roads.

Q. During this period were you familiar with the market price of New River coal?

A. Yes; I was.

Q. Are you able to say whether the prices named in the bills of particulars filed in these cases are fair market prices on the dates in question?

A. I should say so with probably a little exception in one or two cases, according to my knowledge of the market down at the Roads.

Q. Give me the exceptions.

A. Well, of course, beginning or after the Government had the set price that was the same, of course.

Q. Now, with regard to the fixed prices, was or was there not a price applying to bunkers?

A. Yes, sir.

Q. There were two prices before that, Mr. Routten, September 18th and October 17th; have you a list showing those prices?

A. Yes; I think it was five dollars about that time, which was a conservative price.

135 Q. Five dollars for September 18th?

A. Well, commencing during September.

Q. Have you any other comment to make for the fixing of prices?

A. No, sir; not prior to that time.

Q. Now, after the fixing of prices?

A. I believe in June, I believe the bill of particulars gives the price as \$11, if I recall.

Q. That is right; is that correct?

A. Yes; I notice that that is slightly high; that the prevalent price at that time was between \$10 and \$10.50. I notice here that there are three steamers, two of which took cargoes and one bunker. The Wachfels on June 2, cargo at \$10, and the Indian bunkers was \$10.50 on the 2nd of June, and the same date, the Craycroft, the cargo, at \$10.50, and I recall about that time that that was a fair price. I think \$11 is slightly high.

Q. Have you any other prices that were high or low?

A. Yes; in August, here, I notice, if I recall the bill of particulars, and I am correct, it is \$16 for August 3.

Q. Yes.

A. The Cowets was bunkered at \$16.75. The Indianapolis at \$16.75, and the Lake Florilla at \$20.50. By the way, those three names were all August 2 and the bill of particulars gave August 3, which is the nearest approximate date that I could get any record

of. August 7, I find that the price in the bill of particulars is \$14.70; is that correct?

Q. That is September 7?

A. I mean September 7.

Q. \$14.70?

A. The Victoria Venita was \$16.70 bunkers. The Bombadier, cargo at \$17.20. Pylos bunkers at \$13.20, which you see was slightly under the price mentioned in the bill of particulars. The steamship Kate was \$20.20. That is all on the 7th. That makes an average there I should say of \$17 for those three steamers.

Q. Any other dates you want to comment upon, Mr. Routten?

A. Yes. There is some difference in January, 1921. I think the price of \$4.70 is ultra-conservative. It really was about around \$5.20. I have a number of cases here that the price was \$5.20, and even \$5.70.

Q. During that period in January?

A. Yes; from the 11th to the 18th, inclusive.

Q. You keep familiar with the market?

A. Every day; yes.

Q. And, with the exceptions you have mentioned, you regard the prices mentioned in the bill of particulars as fair and reasonable prices?

A. As being conservative, to say the least of it.

Q. Did you have communications with Mr. Carpenter every day at the New York office?

A. Yes, and also with his Norfolk man. We dealt largely with Mr. Carpenter because his coal was of the very best grade, being a New River coal, and all Pool No. 1, no No. 2 in it, and regarded by our clients as being the very best bunker coal, we dealt with him very largely, and if I did not talk with Mr. Carpenter every day I always talked with his representative at Tidewater every day, especially Mr. Carnegite and Mr. Bunny.

Cross-examination by Mr. PEARSE:

Q. You are now one of the officers of the Chesapeake & Ohio—

A. I am employed at Tidewater as their representative.

Q. You were a representative of the New River Collieries, the plaintiff in this case?

A. Yes.

Q. You say you are generally familiar with the market and with the coal situation at Newport News and Hampton Roads?

A. Yes, sir.

Q. What, in your opinion, was the reason for the tremendous drop in the price of coal as quoted here in these exhibits from \$17 in August to \$4 and some cents in January?

A. Well, just at that time in October, November, and December the president of our company happened to be in Europe, and I was very closely connected with the situation there at Norfolk, and of course with him in Europe I received from him by

cable practically twice a week or probably one time there daily reports, showing there was no demand for coal on the other side; it seems that in France particularly they were filled up with coal, had all the coal they wanted; in fact, had ordered more than they needed during the period from June to September; the country was flooded with coal. In fact, at Rotterdam, I believe, the records will bear me out, you might say that there were numbers of cargoes that could not be unloaded on account of the fact that there was so much coal over there. They had purchased heavily and consequently the demand at the time that you ask me about, that is, from November 15, or 20, say, to January, the demand was very much less on that account.

Q. You do not think that had anything to do with the investigation by the Senate committee on matters of this kind, known as the Calder investigation?

A. I don't know that they did.

Q. And you don't know then, as a matter of fact, that there was an attempt being made by the coal operators to remedy this situation of high prices?

Mr. WILLIAMS. I object to that.

Q. (continued). As being one of the causes which brought down the price of coal?

The COURT. Mr. Pearse, there is an objection to your going into the cause of bringing down the price of coal. How is it relevant?

Mr. PEARSE. Well, there is a cause for every market and a reason, I suppose, for every price which is charged.

The COURT. I suppose even if a man corners the wheat market and some one contracts to buy wheat at the market, even though the man he contracts to buy it from is the man who has cornered that wheat market, and the price had gone sky high, that the buyer has to buy at the market, and the measure of damages then is the difference between the market price on that day and the price the next day, and if it takes a tumble of a dollar or ten dollars in the course of a day, the man who has committed himself to buy at the market on June 1 pays the difference between the market price on June 1 and the market price on June 2?

Mr. PEARSE. Yes, and that is where the exact difference comes in and what I have been trying to contend for all along, that just compensation, if the market value is to be a guide, it must be a free and fair market; it must be a market where there is a willing seller and a willing buyer, and any forced market or the price which a man is called upon to pay because he is forced to buy is not a price which is paid in an open market or a free market, and therefore any price which had been paid by any of these people because they were forced to do so for any particular reason is not to be the measure of just compensation which the Government should pay for the coal taken.

The COURT. When it comes to a matter of just compensation is not the answer to that, that just compensation is that which a man may obtain for his property. If we did not take that as our measure, don't we go into the other realm of speculation which is beyond the province of a court and jury?

Mr. PEARSE. No, sir; we can get down to the facts and figures.

The COURT. I know, but is there any case that you can refer me to where a court has said that the words "just compensation" means something different from market value?

Mr. PEARSE. As I apprehend, the opinions which have been given and which your honor has quoted from this morning—

139 The COURT. As I look through Chief Justice Fuller's opinions I do not see that it contains anything that you ask for, and then if it should, what is the measure of damages where the market be not free, if there be a market, and what is the thing that strips a market of its freedom?

(Recess.)

(After recess.)

JOSEPH R. ROUTTEN resumes the stand.

Cross-examination (continued) by Mr. PEARSE:

Q. During this period, Mr. Routten, of January, February, and March of the year 1920, the price of coal both for domestic and export use was fixed by the Fuel Commission, was it not, of the Fuel Administration?

A. Yes.

Q. The price of coal for export was \$4.53?

A. Yes.

Q. That is f. o. b. the mines?

A. Yes.

Q. What was the price fixed for domestic use?

A. I am not familiar with that price because, as I said in the beginning, we were exporting coal and we did not have any interest in the domestic price.

Q. You mean to say then that you did not learn or hear what the price was?

A. I knew it was around \$3.50 or \$3.25, something of that sort, but I did not have any domestic coal, did not handle it at all, did not sell any of it, did not buy any of it. Bunker and export was our business.

Q. And apparently from the figures which you have given as soon as the lid was off, the price went up?

A. It looks that way.

Q. And it did not go down until January, 1921?

A. That is the way the graph would show, that is the curve.

Q. I think you said graft?

A. No; g-r-a-p-h.

140 Q. From what sources did you obtain your information with respect to these prices that you have quoted?

A. There were three sources. One source was our actual sales that I had personal charge of.

Q. By your concern?

A. Yes. The others were prices that were given to me by the fuel inspector of the Shipping Board and the reason I went to him was because he had called on me practically every day for market prices of bunker coal, and I did not have any access to my former employer's books. You see, not being with the New River Collieries Company now, I do not have access to my former employer's books. I could tell a price that was about right, but in order to get actual evidence of actual transactions, I had to go to that source to get it, and I asked Mr. Wright, the assistant fuel inspector, because he and I talked practically every day on the market, he or Mr. Lamb of that office, and he opened his books and I called the dates that I was interested in and he gave me the name of the ship and the number of tons and the bunkers and the price.

Q. You are speaking now of the time when you were connected with which company?

A. Ingalsby-Patterson Company; I have only been with this company a couple of weeks; I was with the other company until March 7; I just recently made a change.

Q. You stated on your direct examination that on August 3 the price was \$16 f. o. b. mines; is that right?

A. I stated that in the bill of particulars the price I believe was \$16, is that what you refer to?

Q. You also said that on that same day coal was sold as high as \$20.50 a ton?

A. Yes; \$20.50, and one sale particularly on August 7, which was just four days, the same ship Kate, I purchased that coal myself.

Q. How much did you pay for that?

A. I paid \$23 for it f. o. b. piers, and subtract \$2.80, it would leave \$22.00. That was the steamer that we were agents for.

141 Q. We got the impression yesterday from Mr. Carpenter that the only difference between the price of coal f. o. b. mines and f. o. b. Hampton Roads, we will say, was the actual freight rate.

A. That is it, yes; that freight rate changes. I presume you know that, don't you?

Q. Yes.

A. There was a change in the freight rate.

Q. This coal which you sold was sold how, f. o. b. Hampton Roads or f. o. b. mines?

A. F. o. b. Hampton Roads. We had to absorb the freight; in other words, it was f. o. b. pier chutes, strictly speaking. That would bring the freight into the invoice.

Q. Was there any shortage during that period?

A. There was an apparent shortage; it was very difficult to get coal without paying a high price for it; that is, you are speaking now of August?

Q. I will take August; yes.

A. I will tell you when the steamer Kate, we had the steamer posted with the Seymour Coal & Coke, with whom we dealt, as I told you before, for her bunkers; I believe it was 1,300 tons for August 7 at \$16, but when the steamer arrived and was put in Lamberts Point for cargo, Seymour advised us that they were unable to bunker the steamer because the Navy Department had commandeered their coal, and that is why we had to do it on the open market, and that is a further reason why I know the market to be \$20.50, because I personally made a special canvass of the market prior to paying that high price for the coal; the demand was great at that time.

Q. Was the amount of coal which might be used for the export trade unlimited or were there restrictions upon it?

A. In what respect do you mean was it restricted?

Q. In any respect.

A. Yes; about that time there was a certain percentage from each pier had to go coastwise; I think as high as 22 per cent from certain sources. Of course that included the New River pools 1 and 2; it included all the pools.

142 Q. And that necessarily affected the price on the export?

A. Well, it naturally limited the supply, and simultaneously with that was the demand on the other side, which was about at its peak, because there were so many buyers in this country. Every day we were having people coming into our office representing firms on the other side trying to buy coal.

Q. During this period that you speak of a certain quantity of coal had to be allotted to the coastwise trade; did the coastwise trade pay the same price that was paid for the export coal?

A. I recall two or three cases that we sent some coal up to New York. I believe we sold some to the Majestic Coal Company for the Federal Sugar Refining Company up here on the Hudson River, and that price at that time was the same as the export price. We put on a couple of barges, one of them was named Tawaka, I think.

Q. Was that true of all coastwise coal?

A. I can say that is true of all that I had any direct interest in.

Redirect examination by Mr. WILLIAMS:

Q. Mr. Routten, you referred to the price of \$4.536. Was that the price bunkered?

A. Yes.

Q. Are you familiar with these trade journals and the quotations in them, mentioning the Black Diamond and Seward's Journal and the Coal Trade Journal?

A. Yes, sir.

Q. Are those quotations regarded as authentic in the trade, accurate; are they taken by the trade?

A. They accord with my idea of the market at Hampton Roads during that period.

By the COURT:

Q. I do not think that is the question; the question is whether the quotations in the journals are regarded in the trade as fair?

A. You mean down at Hampton Roads?

143

By Mr. WILLIAMS:

Q. In the trade journal?

A. Yes; acceptable.

Q. Some reference was made awhile ago to Mr. Berwind of the Berwind-White Company. Did you make any effort to buy spot coal from them?

A. Yes; I did. They are represented at Norfolk by the firm of Baker-Whitely, and by Mr. Blood of Newport News, and I called on them on frequent occasions, possibly I should say once or twice a week for quite awhile until I was convinced that they had no free coal to offer on the spot market whatsoever. The reason Mr. Blood gave us that he did not cater to the current market, the spot market, was because they had their coal covered by contract, and another thing, that they sent a lot of coal over to their foreign depots which they maintained in remote sections for bunkers, and that all of this coal that was shipped in he had out and on his contracts.

REGINALD M. BRYAN, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. Mr. Bryan, what is your business?

A. I am eastern manager of the Black Diamond.

Q. That is the trade journal that has been referred to?

A. That is the trade journal that has been referred to; yes.

Q. How long have you been connected with that journal?

A. Fourteen years.

Q. And what are your duties in connection with ascertaining the market or market prices on coal?

A. My first duty is to prepare each week the market reports and I have charge of the territory that goes into the export trade and New York territory, and I direct correspondence in other territories.

144 During the period from September 18, 1919, to January 18, 1921, were you familiar with the market for spot coal at Hampton Roads, New River coal?

A. Yes.

Q. In what way did you gain that familiarity?

A. In this way: We have a correspondent at Hampton Roads who furnishes us certain information regularly. We have in New York City twenty-five companies that are our patrons, who have branch offices at Hampton Roads, who are in daily telegraphic or telephonic communication, and we are in communication in a great many instances with people traveling back and forth. Now, I have re-

course to all their information. I see sometimes during a period when the market is active maybe half of those people daily, talking to them on the 'phone, and particularly during the past seven years on account of the active markets we have had a great many calls from foreign countries, people who come to us from abroad to investigate conditions pertaining to buying of supplies and things like that, and recommendations as to who to call on, so that we have, I would say, very fair knowledge of what is going on as regards shipments and as regards prices.

Q. With that knowledge are you able to tell us whether the prices which were mentioned in the bills of particulars in these cases on the dates in question for New River coal at Hampton Roads was the fair market prices for the coal on those dates?

A. Yes.

Q. Is it your judgment that they were?

A. It is my judgment that they were fair. Of course, I would not want to go on record as stating that prices were actually those because of fluctuations some days of \$3 a day, but in the main, very fair.

Q. Those prices which are quoted by you in the Black Diamond, are they accepted in the trade as authentic and accurate and responsible?

A. I would say this, that we are constantly supplying quotations to consumers of coal evidently for the purpose of checking up on their contracts. I will say this, that we recently supplied the
145 Midvale Steel. Saturday we had a wire from the Pennsylvania Salt Company of Philadelphia. To-day in my office in New York are two men representing one of the biggest anthracite companies that are going over our books for the purpose of verification of statistics, and we have furnished quotations at various times for court proceedings. Our quotations are published by a lot of the journals and published in Europe regularly by the leading coal trade papers there, and I have never been sued for libel or never have been called a liar in regard to it.

Q. Have you prepared any figures or graphs showing the range of New River coal?

A. I have in a publication which I have there, I have a graph which is made up to the 15th of last October.

Q. Is this the publication [indicating]?

A. Yes.

Q. Did you prepare that yourself?

A. I prepared that myself; yes.

Q. I ask you whether that is your judgment as to the correct and fair market prices of this coal during the period in question?

A. Yes.

Cross-examination by Mr. PEARSE:

Q. What date is that?

A. This was printed on the 23rd of October.

Q. 1920?

A. 1920; and the graph was prepared which showed prices from November, 1919, until the 15th of October, 1920.

Q. You have no figures for October, November, and December?

A. I have some memoranda; I have a memorandum in my pocket.

Q. Let me ask you a question, then; what was the price that you quoted on the 9th of November?

A. On what date?

Q. The 9th of November.

A. As you see, our paper bears a weekly date. I cannot tell you right at this minute what our date of issue was, but the nearest to the 9th, I think, was \$15 at the piers, which would figure back, taking the \$2.80 as the freight rate, would figure back to \$12.20 at the mines.

Q. What would cause a sale of coal at that figure and also a sale of coal on that same day for \$9 a ton, \$9.11 a ton?

A. A difference in the ideas of the buyers, the respective buyers. One man might have an emergency.

Q. The market was variable then?

A. The market, I would say, was variable with that range of prices, the market would be variable. I would say that the prices, when you have got three piers at Hampton Roads, the prices may fluctuate between those piers. A ship may be at one pier and need coal, a few tons of coal, and it would be cheaper to pay \$50 for a ton of coal than it would be to move on to another pier.

Q. When you speak of the fair market value, you say that these prices represent the fair market value; what do you mean by fair market value?

A. I mean that those prices represent what people were willing to pay for coal and did pay for coal about those dates.

Q. Is it necessary to include in your definition the word "willing"?

A. I don't know that it is necessary.

By the COURT:

Q. The prices people did pay are the prices that were given?

A. As I get it, there is no compulsion for them to buy.

By Mr. PEARSE:

Q. Was it not necessary for vessels at anchor in Hampton Roads or any other place to obtain bunker coal?

Mr. WILLIAMS. If the court please, it seems to me—

The COURT. I think that is a question for the jury.

Mr. PEARSE. What I intended to bring out by that question, sir, was this, that in order to get this coal, the vessels or the charterers or whoever you may describe as the persons who buy the coal, they had to pay that price, did they not, in order to get the coal?

The WITNESS. Presumably they did.

By the COURT:

Q. What you mean is the purchasers were giving those prices which you have mentioned for coal at Hampton Roads?

A. Yes.

Q. And those who sold coal were getting that price for it?

A. Yes.

Q. And that was the market price?

A. Yes.

Q. And you determine the market price by what one man will give and the other man will receive for a commodity?

A. Yes.

By Mr. PEARSE:

Q. And the word "fair" then does not enter into your description of the market?

A. Well, I would consider what two people agree upon as a fair price.

Q. No matter whether one was compelled to do it and the other one was able to furnish him with the object—

Mr. WILLIAMS. I object to that word "compel."

A. I do not want to pass as a moralist, but if you want to put me on record I will say that at times I thought the prices were too high. We are suffering to-day from high prices. I was paying \$125 for a suit of clothes that I did not want to pay, that I had to pay.

Q. You had to have clothes?

A. Yes; I paid \$125 for a suit of clothes in New York and I went to London and bought this suit that I have on for \$47, which I regard as a better suit.

The COURT. Now, gentlemen, I think with all due respect to the Government of the United States, that the fallacy of the position taken is illustrated by the examination of this witness.

148 Mr. WILLIAMS. I offer in evidence the exhibits and the graph.

The COURT. How about the magazines themselves from which your excerpts were taken?

Mr. WILLIAMS. The magazines are here, sir; my friend is on record as saying he has no objection to these figures from the magazines. When we were using the exhibits Mr. Pearse said that he had no objection to those figures.

Mr. PEARSE. I think those two exhibits were offered for identification. If your honor please, I wanted to object to the admission of those exhibits.

The COURT. I will hear you on their admission, Mr. Pearse, and I will deny your motion. The testimony shows that they were compiled by a witness who was on the stand, that they represented a tabulation of actual sales, excerpts of magazines, and other circumstances which were entirely within his control.

As to the actual sales, the sales were O. K.'d by him before being made, and the prices were noted by him, and the first exhibit was

simply a codification of the actual sales slips made by the witness, and O. K.'d by him, which were here in court. Now, Exhibit 2 is a codification of the sales reports appearing on Exhibit 1, plus excerpts from the trade journals, the Black Diamond, Seward's Journal, and the Coal Trade Journal. And the trade papers themselves were here in court, and the excerpts and codifications on Exhibit 2 refer to the exact page of those respective journals wherein the information was taken from. It seems to me the exhibits are competent.

Mr. PEARSE. The only purpose of my objection is simply to have it on the record on the particular point I wanted to have on
149 record, which is that Exhibit 1 and I think also Exhibit 2 purport to be sales known as spot sales for export trade, and I object to the use of such a paper for the reason that it would not seem that prices which were obtained for spot export coal are the proper prices upon which to base just compensation to which the plaintiff may be entitled.

The COURT. I will allow you an exception.

The graph was marked "Plaintiff's Exhibit 3."

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. s.]

Mr. WILLIAMS. We rest.

GOVERNMENT'S PROOFS.

JOSEPH W. HOWE, called as a witness in behalf of the Government, being first duly sworn, testifies as follows:

Direct examination by Mr. PEARSE:

Q. Mr. Howe, what is your business?

A. Commissioner of the Tidewater Coal Exchange.

Q. Located where?

A. New York.

Q. Will you describe what that exchange is or the purpose of it?

A. The exchange is an association for the purpose of pooling of coal at tidewater.

Q. And how long have you been in the present position?

A. Since 1917, July 17.

Q. Are you familiar with the conditions at tidewater along the Atlantic coast?

A. Yes, sir; generally.

Q. At Hampton Roads and Newport News?

A. Yes.

Q. Is this Tidewater Coal Exchange a governmental agency?

A. The present one is not; no, sir.

150 Q. Was there one which was a governmental agency?

A. The original exchange was an association of shippers and railroads formed under the National Council of Defense and was

afterwards used by the Fuel Administration as one of its pieces of machinery for distribution.

Q. For distribution?

A. Yes.

Q. And during that period were you with the exchange?

A. Yes.

Q. In what capacity?

A. As deputy commissioner of Hampton Roads, assistant commissioner and commissioner.

Q. During the period from September, 1919, to January, 1921, for how much of that period was the price of coal under the control of the Government?

A. From October 31, 1919—

Q. To the end of March?

A. Up to the 1st of March, 1920.

Q. The agency which you are speaking of; that is, the coal agency, was used by the Government during what period?

A. You are referring to the period you mentioned?

Q. Yes; between 1919 and January, 1921.

A. From November 1 until March 1 by one agency.

Q. That is November 1, 1919?

A. Yes.

Q. To March 1, 1920, by one agency?

A. Yes.

Q. And which agency was that?

A. That is the Fuel Administration operating through the Railroad Administration.

Q. And subsequent to that?

A. Subsequent to that the exchange itself has never been an agency of the Government, although I, as an individual, have been in handling export coal.

Q. And in what capacity were you acting for the Government, subsequent to March, 1920?

A. I was one of four, I suppose you would call them, commissioners—I don't know—four gentlemen appointed by the President to represent him and control the exportation of coal during the months of March and April, 1920.

151 Q. And did your services cease after that then so far as the Government was concerned?

A. For a time; yes.

Q. And were taken up again when?

A. June 24, 1920.

Q. For the same purpose?

A. Well, I was appointed agent of the Interstate Commerce Commission June 24 to administer Service Order # 6.

Q. What was that?

A. That was an order restricting the delivery of coals in an effort to furnish New England with a proper supply of coal and restrict the exportation until a proper supply had been furnished.

Q. And for how long did you continue in that work?

A. Well, that order expired on August 2 or was superseded by Service Order # 11 on that date, which continued in effect until September 17, 1920.

Q. And will you describe your activities as from that date?

A. Since that time I had nothing to do with it except as to directing the operations of the exchange.

Q. During these periods, therefore, which you have described were you familiar with the coal situation?

A. Yes; as far as tidewater was concerned.

Q. The transportation of the coal?

A. Yes.

Q. The exportation of coal?

A. Yes.

Q. And the use of coal for domestic purposes?

A. Coastwise; yes.

Q. Prior to 1919, what was your business?

A. Commissioner of the exchange, from 1917—

Q. And prior to 1917?

A. I was coal freight agent on the Chesapeake & Ohio Railroad.

Q. From your experience are you in a position to express an opinion as to whether or not there was a free open market for coal, both export and otherwise, from September, 1919, to January, 1921?

Mr. WILLIAMS. I object to that; the witness is in no way qualified to answer that question.

The COURT. Is it not a fact question, Mr. Pearse, rather than an expert question?

152 Mr. PEARSE. Well, I will withdraw the question and frame it differently.

Q. From your observation of the situation was the market for coal during that period a free market?

Mr. WILLIAMS. Objected to.

The COURT. It does not seem to me that that is the issue here at all. I think the issue here is: Was there a market; was there a market for coal at Hampton Roads during the period from September, 1919, to and inclusive of January, 1921?

Mr. WILLIAMS. If the court please, he has given no intimation that he knew anything about sales of coal; not a word in his testimony which shows that he knew anything about the selling price or anything of the sort.

The COURT. Well, that is true. I will not bind the question, as that will give you a greater opportunity to object. I withdraw that.

Mr. PEARSE. I have not asked him anything about prices. He knows about the market though. He knows what control was placed over it, the transportation of coal, and everything in connec-

tion with coal. The only thing I have not asked him about is prices. I am not going to use this witness to describe various prices. I want to show by him that there was not a free market for coal.

The COURT. Now, the question is whether coal is bought and sold at Hampton Roads. If it was bought and sold there was a market for coal.

Mr. PEARSE. But if there were any restrictions placed around the sale of coal then it was not a free and open market and of course our contention is that unless there was a free market and a fair market—

153 The COURT. What limitations which any court has held strip a market of being a free market. Now, the cases cited in this admirable compilation of the Navy Department are cases that have nothing at all to do with the purchase and sale of a commodity like coal. The one that comes nearest to being in point is a post-office case, and in that case they speak of the owner being entitled to the value of the property taken, and that means what was fairly to be believed that a purchaser under fair market conditions would have given for it in fact, not what a tribunal at a later day may think the purchaser would have been wise to give, nor the proportion of the advance due to its union with other lots. Now, that is a real estate problem where there would not be any market price as there would be for coal or coffee or lumber or tea or other commodities that were generally dealt in. And so the court says that he is entitled to what may fairly be believed that a purchaser under fair market conditions would have given for it in fact, and not where the market was shot to pieces, not where the whole town was being sold, or something of that sort, but where under fair normal conditions a purchaser would have given a certain price for that particular property. Now, that has no application to the sale of personal property. And the same with all the other cases.

By the COURT:

Q. There was a market down there at Hampton Roads, was there not?

A. Yes.

Q. Coal was bought and sold down there, was there not?

A. Yes.

Q. And prices were paid by buyers for coal and sellers received prices for it?

A. Yes.

154. Q. And there were a number of dealers there?

A. Yes.

Q. During all this period?

A. Yes.

Q. And the prices varied from day to day, did they not?

A. I am informed they did.

Q. To the best of your knowledge?

A. To the best of my knowledge.

Q. And they fluctuated?

A. Yes.

By Mr. PEARSE:

Q. Were there any restrictions on the market?

Mr. WILLIAMS. I object to that.

The COURT. I will allow you an exception. Let us hear what these restrictions of the market were and I will allow Mr. Williams an exception to that.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Signed.)

By the COURT:

Q. What were the restrictions?

A. The restrictions from October 1 to March 1 placed by the so-called central coal committee under the terms of the direction of the Fuel Administrator prohibited the exportation of coal except such coal as was produced in excess of domestic needs.

Q. Also fixed the price on export coal at \$4.536 per ton, did they not?

A. Yes.

Q. That was the price fixed by the Fuel Administration during that period?

A. Yes.

Q. Now, what were the restrictions after the ban of the Fuel Administration was lifted?

A. During the months of March and April the restriction on exportation of coal was placed in the hands of four gentlemen who undertook to carry out practically the same idea and only allowed surplus coal to be exported.

55 Q. That tended to keep a larger supply for domestic use?

A. Yes.

Q. And in that way the market price for domestic use was kept down?

A. That was the object.

Q. What was the price for export during that time; was there any attempt made to keep the price of export coal down?

A. No, sir; none whatever; no consideration of the appraisal of export coal was given at all.

Q. So that the restriction related to the domestic market. Now, what other restrictions were there?

A. Then the restriction under the Interstate Commerce Order #6 of June 24, which had to do with furnishing the cars for loading coal. The carriers were directed not to furnish cars to any man for any purpose for the shipping of coal for any purpose of coal for any purpose other than domestic until all domestic orders had been fulfilled. That order did not accomplish quite what they thought it would and it was modified on August 2, or effective August 2 by

Service Order #11, in which it was estimated what the New England territory needed in particular, and a definite percentage of the coal produced in each district was furnished the railroads which must be furnished to New England by tidewater.

Q. Did any of these restrictions affect the price of coal for export at Hampton Roads?

A. No, sir; only in so far as it made coal less available.

Q. Only so far as it made coal less available for Hampton Roads?

A. Yes; for export.

By Mr. PEARSE:

Q. You say that there were no restrictions placed except as to the limitation of quantity?

A. Yes.

Q. On the coal which might be sold abroad?

A. That is true, except where the Government price obtained.

Q. I mean outside of that period where the Fuel Administration fixed a price?

A. Yes.

156 Q. During the time that those restrictions were placed on the quantity of coal to be exported, can you tell us what the condition in the harbor was with respect to vessels awaiting coal?

Mr. WILLIAMS. If the Court please, I object.

Mr. PEARSE. As to the number and as to their ability to get coal.

The COURT. Now, Mr. Williams, this is along the same lines that I brought out; I think I will allow it and allow an exception.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Signed.)

A. There was a considerable congestion of vessels, as I recall it, at Hampton Roads as well as other ports awaiting coal, and there was considerable shortage of coal as we viewed it. During the first period we did have a miners' strike, which I think lasted from November to December 12.

Q. 1919?

A. Yes; which was followed by a severe winter interrupting transportation conditions. That made it necessary to continue the restrictions as long as the weather continued. Then that was followed by the railroad labor strikes, the switchmen's strike, which brought us up to another shortage, the demand being constantly greater than we could supply on the export coal.

By the COURT:

Q. All of those things tended to increase the price of export coal?

A. Yes.

By Mr. PEARSE:

Q. Would you say that in the month of August, 1920, that transportation facilities were normal and the supply of coal was normal at Hampton Roads?

157 Mr. WILLIAMS. Could that have any possible bearing, if the court please?

Mr. PEARSE. One of your own witnesses said there was nothing wrong with transportation—plenty of coal there.

Mr. WILLIAMS. What difference does it make?

The COURT. The view I take of it is that it makes no difference, but I will let him put it in the record and I will allow an exception to all this testimony.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Signed.)

A. I cannot answer that, because I did not have charge of Hampton Roads in August, as under the Interstate Commerce orders I only had charge of Baltimore, Philadelphia, and New York territory, and I was not familiar with the transportation conditions then.

Q. Were you familiar generally with the transportation conditions from West Virginia?

A. Yes; from that territory serving Baltimore we were in fairly good condition from a transportation standpoint in August, though we still had the restrictions and trying to get sufficient coal to New England.

By the COURT:

Q. There was no trouble about there being a market down there at Hampton Roads for export coal?

A. There was always a demand.

Q. And supply?

A. Some sort of a supply.

Q. And the prices fluctuated according as to whether the demand was greater on one day or another?

A. Yes.

Q. Supply and demand were the controlling factors?

A. Yes.

158 Cross-examination by Mr. WILLIAMS:

Q. Did I understand you to assent to his honor's last remark, that the demand and supply were the controlling factors?

A. I said yes.

Mr. PEARSE. I perhaps did not follow the question clearly.

By Mr. PEARSE:

Q. Demand and supply were the controlling factors where?

A. At Hampton Roads, as to export prices.

Q. And what do you mean by demand and supply, Mr. Howe?

A. Vessels calling for the amount of coal that was there or calling in for an excessive amount of coal more than they were able to furnish them.

Q. And while you don't know the specific prices you know that the price of coal was very high during that period?

A. Yes; I have been given to understand so; I think that was common knowledge.

Q. Do you recall when the price of coal commenced to decrease?

A. We felt it at the northern ports in the latter part of September.

Q. And from your familiarity with the situation did you know the cause?

A. The supply was getting greater than the demand.

Q. So far as export was concerned?

A. Yes; the exports fell off very materially about that time.

Q. Coal is purchased in more than one way, is it not? I mean by that either by contract or by what is known as the spot method.

A. Yes.

Q. At what periods of the year are contracts made usually in the coal trade?

Mr. WILLIAMS. I object to that.

The COURT. I don't see how that has anything to do with it, Mr. Pearse.

159 Mr. PEARSE. If your honor please, my effort has been all along to show, and I might say here, sir, that it is practically a new question that we are dealing with. With the exception of perhaps three very recent opinions, there has been no adjudication of what was meant by Congress in the expression "just compensation" as set forth in the Lever Act. All of the decisions that we have come in contact with have, generally speaking, been decisions which involved the condemnation of land.

The COURT. You see, there we are getting into the question as to whether we can go into the time of making contracts for the sale of coal. The contract prices for the sale of coal with respect to the fair value of coal when taken as of a particular date; in other words, spot coal.

Now, whatever the criterion might be as to the measure of damages with respect to contract coal, it seems to me that it would be inapplicable with respect to spot coal. Whatever your cases are and they relate to condemnation of land, they are all seeking out what is just compensation for that land, and so we are seeking out in this case what is just compensation for the coal. Coal, unfortunately or fortunately, is a commodity that is bought and sold on an open market and we have here the testimony of various men as to what the market prices on that was from day to day. Now, for a court or jury to take a position that market prices does not determine just compensation to me is absolutely beyond the pale.

For the sake of the record get in anything that you want.

Mr. PEARSE. Well, I do not want to be too persistent in arguing all the time what my position is, but perhaps in just a word I can

160 say that we feel that while these cases of condemnations of lands have undoubtedly been based upon the question of the fair market of the land, and that fair market value is determined by property in the immediate location, what it sold for, and the uses for which it was put, we feel that we are to take a commodity such as coal, which is a necessity of life and which is subject to so many conditions, restrictions, and uses, that it is utterly impossible and entirely wrong to pick out one, I might say, isolated use to which coal may be put as a guide for the price of coal.

The COURT. You might answer that it was wrong for the Government to pick out their particular coal as against Berwind-White's or some other companies, and for that reason they are entitled to that which was the highest market, was the best use to which their coal could be put, because the Government has elected to take their coal rather than Berwind-White's or somebody else's coal. Berwind-White or somebody else may use their coal for a better use and for a greater price, so these gentlemen whose coal was taken would be all the law of fairness be entitled to compensation for the best use to which their property could have been put had it not been taken.

Mr. PEARSE. I think perhaps your honor's reasoning might apply if it were a fact that we took only this man's coal.

The COURT. For the purpose of the record, I will let all this go in and allow an exception to the other side.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Signed.)

Mr. PEARSE. That is all.

Mr. WILLIAMS. No more questions.

161 E. A. COBEY, called as a witness on behalf of the Government, being duly sworn, testifies as follows:

Direct examination by Mr. PEARSE:

Q. Commander Cobey, you are an officer of the United States Navy?

A. Yes.

Q. In the Bureau of Supplies and Accounts?

A. Yes.

Q. With your office at Washington?

A. Yes.

Q. And the duties of the bureau are to supply the Navy with necessities which it requires?

A. Yes.

Q. Such as fuel?

A. Yes.

Q. And matters of that kind?

A. Yes.

Q. Did the Navy in the year 1919 advertise for bids for coal such as is in litigation here?

A. They did.

Q. At what time?

A. Those bids were opened in May of 1919. They covered all of the suppliers that have coal that met with the Navy's uses in vessels. Of course, that is a different grade from what is used in naval stations ashore.

Q. We are speaking now of the bids for the kind of coal which is in litigation here?

A. Yes.

Q. What was the quantity of coal required by the Navy?

A. The quantity required that year was three million tons. It was an estimate, but it proved to be a fairly correct estimate of what was needed. There was offered—

Mr. WILLIAMS. Just wait a minute. He did not ask what was offered.

Q. As a result of the advertising for bids, were any bids received?

A. Yes; there were twelve.

Q. And for what quantity of coal?

Mr. WILLIAMS. If the court please, I object. A bid can not possibly fix market price. A market price is fixed by actual transactions, and that is the only issue here.

162 (Discussion off the record between court and counsel.)

The COURT. I sustain Mr. Williams's objection and strike out the entire line of testimony as irrelevant and incompetent on the question as to the compensation for coal commandeered and allow an exception.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. s.]

Q. How was this coal in question commandeered?

Mr. WILLIAMS. I object to that.

Q. What methods were used as to quantity, as to time, and as to place?

Mr. WILLIAMS. I object to that.

The COURT. Objection sustained for the reason that the pleading state the manner of the taking of the coal, and exception allowed.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. s.]

Q. How much notice was given to the plaintiff in this case from time to time that it would be required to furnish coal for the Navy?

Mr. WILLIAMS. I object to that.

The COURT. Sustained.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. s.]

163 Q. Can you tell us whether or not, in your position in the bureau, you have made a study of the coal situation during the years 1919 and 1920 and the early part of 1921 with respect to the supply of coal, the demand for it, and the prices which obtained?

A. I have.

Q. As a result of that study and as a result of the advertising for bids by the Navy, was it possible for the Navy to secure coal under contract?

Mr. WILLIAMS. I object to that.

The COURT. Objection sustained.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. S.]

Q. In your investigation of the situation with respect to coal what did you do?

Mr. WILLIAMS. I wonder if we might not have an offer of proof to save time, if the court please, if that is compatible with your practice. I ask for an offer of proof.

Mr. PEARSE. I don't know whether that will make my record good or not.

The COURT. I assume if I exclude your offer and allow you an exception it is as good a record as is obtainable on a point of this kind.

Mr. PEARSE. All right, sir. I desire to offer by this witness proof that the Navy advertised for bids for coal with a result that sufficient bids were not received to supply coal in sufficient quantities for the use of the Navy.

Mr. WILLIAMS. I do not want to break in, Mr. Pearse, but is it necessary to repeat what has been ruled out?

164 Mr. PEARSE. I am stating my offer. That as a result the Navy requisitioned under the authority of Congress a supply of coal for the years 1919, 1920, and 1921. That they fixed the price which they considered to be just compensation, using as bases for arriving at the figures reports of the Federal Trade Commission, based upon reports furnished to the Federal Trade Commission by the coal operators in this New River district as to the cost of producing coal and a reasonable margin of profit thereon, including all overhead and everything else in connection with the production of coal.

They also based their figures as a result of conferences with coal operators themselves, who advised the Navy as to what would be a just price and a reasonable price for the Navy to pay for coal. Some of the operators, and quite a large number of them, preferred that the coal should be requisitioned rather than that the Navy should contract for it, for reasons of their own. That they based those prices also on figures supplied by the Fuel Administration. That they did not consider that what is known as spot export prices should in any way govern the prices which should be paid to the coal operator for his coal, but rather that as the coal was to be taken in small quantities each month, distributed among 67 companies operating in

this district, that it was fair to fix a price which would be consistent with the fair contract price for coal.

I desire to show further by this witness that coal was supplied to the Panama Railroad Company and to other companies, I believe, at a price which compared with the prices which the Navy allowed the plaintiff in this case.

I also desire to show by this witness that while it is true
165 that on particular dates as set forth in the schedule attached to the complaint in this case, they were the days upon which the coal was actually delivered by the plaintiff to the Navy; that previous notice was given both by the requisition orders and by other notices which were sent out, so that ample time might be afforded the plaintiff in this case as well as the other co-operators as to what the necessities of the Navy were at once, so as not to deplete the pool at Hampton Roads.

Mr. WILLIAMS. I object to that in toto.

Mr. PEARSE. I also want to prove by this witness that it is customary in the coal trade to make contracts for coal in the month of April of each year to cover a period of either months or a year, and that there is a vast difference in the price which is paid for contract coal from the price paid for purely speculative coal, such as has been testified to by the witnesses for the plaintiff. That the market at Hampton Roads was a purely speculative market and did not in any way represent the reasonable value of the article itself. Also that there is a distinction in the price between what is known as export coal, spot and domestic coal spot, the price of coal for domestic use being much less than the prices that were obtained at Hampton Roads during this period for spot export coal.

I also desire to prove by this witness that Mr. Carpenter, the vice president of the company, furnished to the Navy through a letter written by him on February 19, 1919, figures to show what it cost his company to produce the coal, showing that the average cost of production during the year of 1918 was \$2.79, and from those figures to show by this witness how the Government arrived at additional sums which increased the amount which the Government thought was just compensation to be paid for the coal.

166 Also I wish to show by this witness and to offer in evidence letters written by this company in which they express a desire to be compensated for the coal which they took on the basis of cost plus, which is familiar to all of us.

The COURT. Now, there, are you going into the question of a waiver of its right under the commandeering statutes?

Mr. PEARSE. I had not intended to offer it for that purpose.

Mr. WILLIAMS. Of course, we would have resisted this, but it seems to me that is out of line. If you have any such letters I think you ought to produce the letters.

Mr. PEARSE. You do not mean to suggest that I was going to produce anything that I did not have?

The COURT. It occurs to me that letters purporting to show a willingness to take compensation arrived at by the Government would create a different legal aspect from any that we have had so far. So I think that your offer as to that ought to be couched in possibly a different form; that the letters themselves ought to be offered and I will rule on those later on.

Mr. PEARSE. I will do that later. I also desire to prove by this witness that out of 52 coal operators whose coal was requisitioned all but ten have expressed their satisfaction with the prices set by the Navy, five have objected, and the other five have not been heard from. I would like to change that. Perhaps Commander Cobey had better state that; may he do that, as though I were making the offer?

The COURT. Just let the stenographer have the figures of those who accepted and those who rejected it.

167 The WITNESS. There were 42 accepted and five objected and five have not been heard from.

The COURT. That is just as you stated it.

Mr. PEARSE. And out of those five who rejected it one is the plaintiff in this suit who with two others have brought suit.

I also desire to show by this witness that there is such a variation in the price of coal that even in one of the suits which was brought by one of these five objecting companies, an allowance of \$5.50 was made by the court.

The COURT. Court or jury?

Mr. PEARSE. Court; no jury; the court sitting as a jury.

The COURT. Upon that offer I sustain the objection which Mr. Williams makes for the reason that it is incompetent in a suit brought for the recovery of damages for commandeering of coal taken. The offer to prove any of the facts and circumstances referred to in the offer as to the letters which you referred to, I will have to see those and see whether they might constitute a waiver of the right to demand just compensation that would be fixed by a jury for the property taken.

Mr. PEARSE. There are two of them right together.

Mr. WILLIAMS. I object to them.

The COURT. I will exclude the letter of May 26, 1920, purporting to be written by John E. McGowan to the Navy Department, Bureau of Supplies, for the reason that the same does not amount to a waiver of any legal rights which the plaintiff company might have. And the same with respect to the letter of November 4, the letters being merely a willingness to compromise before this dispute actually arose.

168 Mr. PEARSE. If the court please, that is all I can think of now. I have two or three witnesses here who will probably suffer the same fate, who come from Washington.

The COURT. You can state your other offers to-morrow morning. Suppose you swear those witnesses.

DAVID L. WING, called as a witness on behalf of the Government, being duly sworn, testifies as follows:

Direct examination by Mr. PEARSE:

Q. What is your business?

A. Statistician and economist, Washington, D. C.

(Witness withdrawn.)

WALTER Y. DURANT, called as a witness on behalf of the Government, being duly sworn, testifies as follows:

Direct examination by Mr. PEARSE.

Q. You occupy what position with the Federal Trade Commission?

A. I am one of the assistant chief economists, of the Federal Trade Commission.

Q. You are familiar with the files and records of the commission with respect to the production of coal?

A. They are under my charge; yes.

Q. The cost of production of coal?

A. Yes.

Q. And all of the figures in connection with the cost of production of coal?

A. Yes.

Q. You are also familiar with the records of the Federal Trade Commission which contains reports made by the coal operators in the New River District with respect to the cost of producing coal at their mines?

A. Yes.

Q. Might I have a statement in that connection?

A. Your Honor, I was directed by the Federal Trade Commission to state that I appear here as an involuntary witness under
169 subpoena; to call the attention of the court to the character of the records which I was subpoenaed to bring, to wit; that they are among other things the original reports furnished by individual operators to the Federal Trade Commission, together with summaries and consolidations thereof; that those reports and the summaries from them had been reported by the commission as not to be publicly identified with the names of the particular companies furnishing them.

The COURT. Is there anything in the law creating the Federal Trade Commission that constitutes these reports made from the different operators' public records?

Mr. PEARSE. They shall not be used except under order of the court.

The WITNESS. I was also directed, your honor, to call the attention of the court to this law of the Federal Trade Commission, the organic act creating the commission, section 6-f, as follows:

"That the commission shall also have power—(f) to make public from time to time such portions of the information obtained by

hereunder, except trade secrets and names of customers as it shall deem expedient and in the public interest."

And further to call attention to the latter part of section 10 of the act, which reads:

"Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding \$5,000 or by imprisonment not exceeding one year, or by fine and imprisonment in the discretion of the court."

Mr. WILLIAMS. I object to that going in, if your honor please.

170 The COURT. I think we are going to dodge the very question at issue in this case because the testimony that might give would be with respect to the cost of production of the New River Collieries Company during this period, and in my view of the law it is inadmissible for the reason that it is incompetent and irrelevant and immaterial as to the question of just compensation to be paid.

CHARLES F. NAPIER, Jr., called as a witness in behalf of the Government, being duly sworn:

The WITNESS. I might also state that I am subject to the same statement.

Mr. PEARSE. This witness would make the same statement that the previous witness did.

The COURT. His testimony is excluded for the same reasons.

Mr. PEARSE. I do not want to swear any more witnesses to-night. I thought you said we would adjourn now and then whatever statements I had to make for the record could be made in the morning.

The COURT. Yes; we will adjourn until ten-thirty.

(Adjourned to March 31, 1921, at 10.30 a. m.)

171 Trenton, N. J., March 31, 1921, 10.30 a. m.

Trial continued.

Mr. PEARSE. If the court please, may I finish the offer which I was making yesterday with respect to some of the witnesses that returned to Washington?

The COURT. Yes.

Mr. PEARSE. I made a mistake in describing Mr. Napier as occupying the same official position as Mr. Durand. In all other respects his testimony will be the same, but his position is acting chief accountant of the Federal Trade Commission.

Then Mr. Wing was sworn and I offered to prove by him in the first place that he is an expert on the cost of mining and producing coal, including export coal, on prices other than purely market prices, and we offer him for the purpose of proving what it cost to produce this coal, together with what would be a reasonable profit to be made thereon, and that through his connection with the other depart-

ments of the Government who are engaged in this work he was in conference with the Shipping Board of the Navy and the Bureau of Supplies and Accounts concerning the prices fixed by the Navy for the coal of the plaintiff which was taken. I understand that your honor overrule that?

The COURT. Yes.

Mr. PEARSE. Exception.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. S.]

Mr. PEARSE. Now, if the court please, I will recall Commander Cobey.

172 E. A. COBEY recalled.

By Mr. PEARSE:

Q. Commander Cobey, have you here with you all the letters or copies of letters passing between the Navy Department and the plaintiff in this case with reference to the coal in question?

A. We have.

Mr. PEARSE. I offer those letters in evidence.

Mr. WILLIAMS. I think they should be considered one by one, if the court please.

Mr. PEARSE. All right.

The COURT. Mr. Pearse, what is the legal effect claimed for the letters?

Mr. PEARSE. They show the circumstances under which the Navy took the coal, the correspondence containing the prices to be paid for the coal and the amount of the coal which was taken, the distribution of the taking of the coal over different periods so as to be fair to the plaintiff, and the quantity taken from that particular company.

The COURT. Do they anywhere show an acceptance by the plaintiff company of the proposition of the Navy?

Mr. PEARSE. Frankly, I believe I must answer that question in the negative, except in so far as it may be inferred from the two letters which were rejected yesterday as being the opinion of the plaintiff of the prices which it should be paid for the coal. Your honor will recall the contents of those letters.

The COURT. Yes; but those letters which I read—those two letters—indicated to my mind that there had been negotiations with respect to coal; that there had been no agreement with respect to coal, and that the plaintiff terminated the negotiations; there-

173 fore the Navy's right not resting in contract must rest under the statute. Now, if they rest under the statute it becomes a question for a court and jury as to what is just compensation, and upon that question what some official of the Government may say has no bearing where the commodity is dealt in on the open market.

Now, there is no proof to show that there was not a market for this kind and quality of coal at Hampton Roads at the time; that fact is uncontroverted. Therefore, there is but a single question and that is, what is the market price?

Mr. PEARSE. The fair market price.

The COURT. What is the market price? You are not dealing now in real estate. You are dealing in a commodity, personal property. What is its market price?

Now, if the letters tend to show that there was a contract, then the Navy ought not to stand on the commandeering, but ought to defend the action on the theory that there was an agreement with respect to the taking of the coal.

Mr. PEARSE. As I have already stated, we cannot go that far. I cannot state that the contents of those letters will reveal any such situation.

The COURT. Now, has the Government any proof that there was not a market?

Mr. PEARSE. That is what I am going to ask Commander Cobey, qualify him as an expert, and bring that out to the best of my ability.

Mr. WILLIAMS. There was an offer of letters, if the court please; I object to them.

The COURT. Your objection to the offer of the letters is sustained, and counsel for the Government has an exception.

174 Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. s.]

By Mr. PEARSE:

Q. Have you here the reports and other sources of information outside of your own personal knowledge which were used by the Department of Supplies and Accounts of the Navy in determining what, in your opinion, was just compensation for this coal taken?

A. We have.

Q. And in fixing the price to be paid for the coal?

A. Yes.

Q. What do those reports and other data consist of?

A. They consist of reports received; they are reports of conferences held with suppliers of coal from this field where the plaintiff's coal came; they are reports from the United States Senate Committee on Reproduction and Construction that held various Senate hearings on coal; they are reports from the Senate Committee on Manufacturers, that held hearings on coal for several months; reports from the Interstate Commerce Commission and other governmental departments; also other operators, of what they considered the price to be for coal.

Q. And that information is all contained in the records which I have just referred to?

A. Yes; certified copies, certified by the Secretary of the Navy.

Mr. PEARSE. I offer all those records in evidence.

Mr. WILLIAMS. I object to them.

The COURT. Objection sustained.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. s.]

175 Mr. PEARSE. May we have all those marked for identification; there are quite a few of them?

The COURT. Yes.

The papers were marked for identification as follows:

Government's Exhibit G. 1 for identification: Copy of petition in the case of the New River Collieries Company as received with Department of Justice letter 212607-1, and solicitor's endorsement 28745-134: 1.

Government's Exhibit G. 2 for identification: Copy of petition in the case of the New River Collieries Company as received with Department of Justice letter 213487-1, and solicitor's endorsement 28745-134: 6.

Government's Exhibit G. 3 for identification: Certified copy of Navy Order N-3005, dated 12 June, 1918, copy of letter received from the Chesapeake and Ohio Coal and Coke Company dated 19 February, 1918, and statement from the disbursing officer dated 7 January, 1921.

Government's Exhibit G. 4, for identification: Certified copy of Navy Order N-6112, copies of modifications issued in regard to change in quantities and price and copies of Schedule 3989 opening 29 May, 1919, showing bids received for supplying coal at \$3.08 per gross ton f. o. b. mines.

Government's Exhibit G. 5 for identification: Copies of correspondence between this department and the Chesapeake and Ohio Coal and Coke Company, selling agents for the New River Collieries Company.

Government's Exhibit G. 6 for identification: Tabulated statement showing prices paid for coal to other suppliers operating mines in the vicinity of the New River Collieries Company's mines. Memo-

176 randum showing names of companies who have accepted Navy orders as satisfactory, and who are supplying coal from mines located in the New River district adjacent to the mines of the New River Collieries Company (Chesapeake and Ohio Coal and Coke Company).

Government's Exhibit G. 7 for identification: Copy of Executive order of 21 August, 1917.

Government's Exhibit G. 8 for identification: Copy of Executive order of 27 October, 1917.

Government's Exhibit G. 9 for identification: Fuel Administration's publication #4-C of 1 March, 1918. Fuel Administration's publication #4-D of 22 April, 1918. Fuel Administration's publication #4-E of 26 May, 1918. Fuel Administration's publication #4-F

of 7 October, 1918. Fuel Administration's publication #29 of 20 September, 1918.

Government's Exhibit G. 10 for identification: Letter of the President to the Federal Trade Commission dated 25 July, 1917.

Government's Exhibit G. 11 for identification: Federal Trade Commission's Bulletin #5 of 25 August, 1920. Federal Trade Commission's Bulletin #6 of 30 October, 1920.

Government's Exhibit G. 12 for identification: Federal Trade Commission's special table on April and May costs.

Government's Exhibit G. 13 for identification: Reports of conferences between Navy representatives and coal operators.

Government's Exhibit G. 14 for identification: Memorandum of 27 August, 1920, showing method of price determination.

Government's Exhibit G. 15 for identification: Memorandum of 18 November, 1920—summary of various publications.

177 Government's Exhibit G. 16 for identification: Report of transportation disability during several periods covered by Navy Order N-6112.

Government's Exhibit G. 17 for identification: Summary of bids received under several openings—29 May, 1919; 4 November, 1919; 6 April, 1919; and 18 May, 1920.

Government's Exhibit G. 18 for identification: Bituminous Coal Commission award of wage increase, as submitted to the President 10 March, 1920.

Government's Exhibit G. 19 for identification: Data in regard to loading of coal delivered by the Chesapeake and Ohio Coal and Coke Company.

Government's Exhibit G. 20 for identification: Statement from disbursing officer in regard to payments offered Chesapeake and Ohio Coal and Coke Company on 75 per cent basis.

Government's Exhibit G. 21 for identification: Copy of correspondence showing why payment of 75 per cent has not been tendered on last three deliveries shown on Exhibit 1 of Petition 1. Copy of correspondence showing why payment of 75 per cent has not been tendered to the Chesapeake and Ohio Coal and Coke Company on deliveries of coal received under Exhibit 1 of Petition 2.

Government's Exhibit G. 22 for identification: Copy of S and A circular letter, 19 August, 1919, re wage increases. Copy of S and A circular letter, 10 September, 1919, re wage increases. Copy of S and A circular letter, 24 April, 1920, re wage increases. Copy of S and A circular letter, 29 January, 1920, re wage increases. Copy of S and A circular letter, 18 October, 1920, re wage increases.

Government's Exhibit G. 23 for identification: Supplement to general orders, regulations, and rulings of the United States Fuel Administration.

78 Government's Exhibit G. 25 for identification: Certified copy of Congressional Record, volume 60, No. 26, of 7 January, 1921.

Government's Exhibit G. 26 for identification: Senate calendar report No. 782, dated February 24, 1921.

Government's Exhibit G. 27 for identification: Correspondence regarding Navy Order N-6158.

Government's Exhibit G. 28 for identification: Tabulation regarding suits brought against the United States by C. G. Blake, New River Coal Company, and New River Collieries Company. Also collector of customs report regarding export coal from Hampton Roads.

Government's Exhibit G. 29 for identification: Copy of letter, 25 March, 1921, from Panama Railroad Co.

Government's Exhibit G. 30 for identification: Copy of Navy contract 26487, dated 5 June, 1916, with Chesapeake and Ohio Coal and Coke Company.

Government's Exhibit G. 31 for identification: Statement of Interstate Commerce Commission showing prices paid by Virginia Chesapeake & Ohio, and Norfolk & Western Railroads, March to December, 1919 and 1920.

Government's Exhibit G. 32 for identification: Copy of letter of New River Coal Company, 9 August, 1920.

Government's Exhibit G. 33 for identification: Federal Trade Commission quarterly report No. 1, 1920.

Government's Exhibit G. 34 for identification: Copy of bid of Chesapeake and Ohio Coal and Coke Company opened 6 April, 1920.

By Mr. PEARSE:

Q. How long have you been in the Navy?

A. Thirteen years.

179 Q. And during that time how long have you been connected with the Bureau of Supplies and Accounts, particularly with respect to fuel and other supplies of that kind for the Navy?

A. I have handled coal for twelve years. I have been in the Bureau of Supplies and Accounts for four years.

Q. Are you familiar with the amount of coal which the Navy uses per annum, approximately?

A. I am.

Q. And when I speak of coal I mean coal of this particular field how many tons does it use? In the first place, how many tons does it use altogether?

A. This year 1,828,000 tons was estimated.

Q. How does that compare with previous years?

Mr. WILLIAMS. If the court please, is that relevant to the issue?

The COURT. Do I understand that there is an objection?

Mr. WILLIAMS. Yes.

The COURT. Objection sustained.

Mr. PEARSE. Can I be heard on that? I am attempting to qualify this witness as an expert who will be able to contradict the expert opinions which were expressed yesterday by the witnesses for the plaintiff.

The COURT. This man is an officer in the Navy.

Mr. PEARSE. Yes; and he buys coal for the Navy, the largest buyer of coal in the world.

Mr. WILLIAMS. Not during this period evidently.

Mr. PEARSE. Do I understand my question is overruled?

The COURT. I do not see the fact that he bought or the Navy buys has anything to do with what he may know with respect to the market at Hampton Roads.

180 Mr. PEARSE. I will go further. I thought perhaps that I might show what his capacity was if we could show the quantities that he was superintending the buying of.

The COURT. Well, I will leave the door open fairly wide for the qualification and allow an exception to the plaintiff.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Signed.)

By Mr. PEARCE:

Q. Have you been in charge of the purchase and acquisition of coal by the Navy?

A. I have.

Q. Have you made a study of coal conditions with respect to quantities and quality and prices of coal?

A. I have.

Q. Are you familiar with the coal markets?

A. I am.

Q. And upon what is your information based?

A. Upon the actual purchase of coal, conferences very frequently with coal operators, sellers, and with buyers of coal, and daily telephone communications and reports from Hampton Roads, from New York and Philadelphia two and three times a week, and letters and telegrams from those sources indicating the markets.

By the COURT:

Q. Is there a market for coal at Hampton Roads?

A. Now, sir?

Q. Yes.

A. There is a free market now; yes, sir.

Q. There was a market all along, was there not?

A. A restricted market existed.

Q. What restricted it?

A. The restrictions on the spot market was principally the very small quantity of coal that was at hand as compared with the demand.

Q. Is not that always a restriction where the supply is low and the demand is great?

A. Yes.

31 Q. The coal was bought and sold, was it not, at Hampton Roads during all this period?

A. Well, irregularly.

Q. But it was bought and sold during the entire period, was it not?

A. It was, but not in the same way that coal is ordinarily bought and sold.

Q. Not in the same manner as it had been but it was bought and sold during that period, was it not; that is, the period of the coal in suit?

A. Well, it was, of course, bought and sold, but there were many times when there were no sales.

Q. Because there was no coal?

A. Yes.

Q. But when it was bought and sold it was bought and sold in market, was it not?

A. Yes.

Q. And when it was not sold it was because a supply was not there?

A. That, and, your honor, I was going to say the restrictions of the various governmental agencies regarding transportation to New England and the Great Lakes, as I believe was testified to yesterday.

Q. They affected the supply, did they not?

A. They affected the supply; yes, and the distribution.

By Mr. PEARSE:

Q. What is spot coal?

A. Spot coal is coal that is offered for immediate sale on the spot. I would say, as distinct from coal that you have an order for ahead.

Q. What percentage of the total quantity of coal distributed at Hampton Roads is represented by spot coal?

Mr. WILLIAMS. If you know, Commander.

The WITNESS. What is that?

Mr. WILLIAMS. If you know.

Mr. PEARSE. Do you object to the question or are you coaching the witness?

Mr. WILLIAMS. I am cautioning the commander that he should not answer unless he knows.

The WITNESS. Will you repeat the question?

Q. (Repeated.)

A. That varies a great deal. Ordinarily it is ten to fifteen per cent, and sometimes twenty per cent, but in a particular period it may be as high—

Mr. WILLIAMS. I object; just wait a moment.

The COURT. Let him answer and then move to strike it out.

A. (Continued.) It depends entirely on the period. At times they are as high as twenty per cent, I should say; at times as low as five per cent, well, at times there is none, but at times as low, to give a fair estimate, as five per cent of the coal is sold that way. The estimate is generally given at ten to twenty per cent.

Mr. WILLIAMS. I move that the answer be stricken out as irrelevant, if the court please.

Mr. PEARSE. He is describing what spot coal is. They come here in court and say that spot coal for export use indicates a fair market price to be paid for coal. We want to show what spot coal is, and show what percentage of the whole coal field it represents.

The COURT. I think that the purpose of that is to show that the market price for spot coal was at such and such a price and that they are entitled to the price in the best market where their coal could have been sold. In other words, their just compensation is measured by the best price that they can obtain. And so, unless you are controverting the existence of the spot market I do not see that that is an issue.

Mr. PEARSE. Well, it is well to have an opinion as to the definition of terms by this witness.

Mr. WILLIAMS. I do not object to the definition, if the court please.

The COURT. The definition of spot is already in. If the definition given by the plaintiff's witnesses as to what spot coal was is incorrect, then I think it proper that this witness should be examined upon it. If it is merely corroborative of what has already been testified to, I take it to be inadmissible on the defendant's case.

Mr. WILLIAMS. He has already said what it was; exactly what we said it was.

Mr. PEARSE. I do not deny that. I thought if he explained it a little more fairly perhaps than your witness did.

Q. In the coal trade who sets the standard of prices at which the great bulk of the coal of this character is sold?

A. The Navy.

By the COURT:

Q. How does the Navy fix the price in the market at which coal of this character shall be sold?

A. Your honor, it does not fix the price; perhaps my answer was not clear enough or full enough on that, but the price paid by the Navy is constantly referred to by the trade journals. For instance, the Black Diamond referred to yesterday in the issue of three or four weeks ago said that the whole contract market on steamer coal was waiting on the Navy and the Shipping Board, the two greatest consumers, and the Shipping Board has followed our lead, and we have awarded contracts because we considered that the justifiable market existed.

Q. Now, just a minute. If the Navy goes into the market to buy coal, not by contract, but to buy spot coal, what are the factors which determine the price which the Navy will pay?

A. We never buy spot steaming coal, sir, so that we have never had any experience in that.

Q. So the Navy does not fix the price on spot steaming coal then?

A. Spot steaming coal?

Q. Yes.

A. The Navy does not fix the price on spot steaming coal, because ordinarily the spot price follows the contract price.

184 Q. I see; and the spot price is free and is determined by the factors of supply and demand in the market, is it not?

A. Well, in the same way that the contract price does.

By Mr. PEARSE:

Q. That is, if there are restrictions preventing a free market in the contract coal those restrictions are also reflected on the spot coal.

Mr. WILLIAMS. Just wait a minute; he is my friend's witness; think he should not be led, if the court please. I object. The witness has already said there was a market; there were purchases and sales, with all the qualities of a real market just as the first witness for the defendant said, so that on this witness' testimony only there can be a direction that there was a market; there were the legal elements of a market. Therefore, the only question is, What was the market price?

The WITNESS. Your honor, may I make a statement supplementing my answer to your question regarding the market to make the situation, I think, perfectly clear?

There were a large number of occasions last year when the Navy did not consider there was a market. That question came up repeatedly for decision in the Navy Department and a number of cases they did not consider there was market.

Mr. WILLIAMS. I move that the answer be stricken out.

The WITNESS. But during that whole period, as you asked, markets existed, but, as I said, at irregular times. I just merely wanted to clarify the position that we have always had.

185 By the COURT:

Q. Let me get your position. The Navy did not regard the market as in existence?

A. A spot market at the time.

Q. Now, the existence of the market would depend upon whether there were sellers who had a supply ready to sell and whether there were consumers ready to buy, would it not?

A. Yes.

Q. Now, did the Navy as a fact determine that there were no sellers willing to sell and no buyers willing to buy?

A. At times it did; yes.

Q. Was that in fact true?

A. To the best of my knowledge it was. The coal trade journals that were quoted yesterday, your honor, they on many occasions during certain weeks put no quotations upon the stock market.

Q. Were you down at Hampton Roads? Did you go around among the buyers and the sellers to find out whether they were buying and selling coal?

A. I did, but I did not go to Hampton Roads. We have a representative there who gets it. I was in constant touch with the sec-

tary of the Smokeless Coal Operators' Association where nearly all of our coal—who furnish nearly all of our coal, although the plaintiff, I believe, is not a member of that, and consulted frequently with representatives. For instance, I have consulted with a representative of this same company; they have a representative in Washington.

Q. You have seen the plaintiff's exhibits, have you not, in which they show actual sales of coal made during the period at certain prices on the open market at Hampton Roads? I show you Exhibit P. 1.

A. Yes: I have seen that.

Q. You have no doubt as to the truth of that exhibit, have you?

A. Oh, I don't doubt that that is true. We do not consider those irregularities as sufficient to justify a market at times when the trade papers quoted no market, and when we knew of no market.

186 Q. Is it not true that where a commodity is sold every month in the year and every week in the year that there is a market for that commodity even though it be nont sold on certain days in the week because of a lack of supply?

A. Your honor, the other exhibit shows in two or three places no quotations for certain periods, and during a certain number of weeks the Coal Trade Journal and the Black Diamond quoted—we do not take the Coal Age, though we occasionally see it—quoted no market, and so there were certain weeks in which there was no market.

Q. But the plaintiff was actually selling during all that period, at least every week as shown by this Exhibit P. 1 which you say is correct?

A. Well, I have no doubt that it is correct, but I don't know just the circumstances under which those sales were made, but the chances are that there are a number of weeks in which the coal trade did not consider what small sales were made constituted any market, otherwise they would not have quoted no market at various times.

Q. The excerpts from the Coal Trade Journal show after the Government price fixing has expired quotations for nearly every week during the period, do they not, as shown in plaintiff's Exhibit P. 2? Now, is it or is it not true that those excerpts as set forth on that exhibit are false?

A. I have no doubt they are correct, sir; but now, for instance, for the month of April, 1920, the Coal Trade Journal is "Market, none—no quotation," and also for September or October it is market none. That means that they considered that there was no market at that time.

By Mr. PEARSE:

Q. September and October of 1920 and 1919, both?

A. September and October of 1919, also; I have an extract that I did not bring along that we make for our own purposes down there, for another purpose, that showed a number of weeks in which there was no market.

187 By the COURT:

Q. That is, it showed that there was no sales?

A. Well, there are quotations, your honor, which say, "Market prices were so and so during the week" and they omit that in a number of weeks where they do not show any sales at all.

By the COURT:

Q. But that does not affect the existence of an open market in which coal is freighted in where coal is to be obtained, does it?

A. Yes; in our opinion, it did.

Q. Is it not your opinion really that there was no coal sold during a certain time so you were unable to determine what the price was because none was offered for sale, but if some had been offered for sale there was a place where it might have been sold, was there not?

A. Undoubtedly there were sales made during every week; I do not doubt that. But we have no evidence of it nor have the trade papers apparently any evidence of it or if so they did not consider it sufficient to base a quotation on and for those reasons they quoted no market during the several weeks and we considered no market at various times.

Q. Did you read Saward's Journal?

A. No, sir; I do not think that that is one—that is not a paper that we know, and our library takes the leading, what they understand as the leading, coal trade papers. I have no doubt that is a very authentic paper. We take three.

Q. You take the Black Diamond?

A. We do; yes.

Q. Now, the Black Diamond during that week in September where Saward's Journal shows no coal price shows, as appears from Exhibit 2, a market price quotation, does it not?

A. Yes.

Q. The men from the Coal Trade Journal may have been less industrious than the Black Diamond representative, may it not be that?

A. Your honor, these periods do not cover every week, and
188 while I am not prepared to say that the Black Diamond did not quote every week, yet my impression is that there were weeks in which it did not quote either on contract or spot market at Hampton Roads. I know the Coal Trade Journal did not.

Q. The Black Diamond shows a market price, does it not, as appears from the exhibit at about the same time as each one of the commandeering which occurred by the Navy Department?

A. It evidently does. I have not examined that closely, but of course that is only one of a number of papers.

Q. And that would indicate to your mind, would it not, that there were market quotations for coal as of about the time when the coal in question was taken?

A. No, sir; I cannot conscientiously say that it does.

By Mr. PEARSE:

Q. In the coal trade does the sale of a small quantity of coal or the sale of small quantities of coal such as the spot sales have been

described as being by the other witnesses, are they sufficient to create what would be considered in the trade as a market upon which the price of coal could be based?

Mr. WILLIAMS. I object to that.

The COURT. Objection sustained and I will allow an exception.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. s.]

Q. Is the market price of coal regulated and fixed in the same manner as would be fixed the market price of shares of stock where one or a few quotations were made?

Mr. WILLIAMS. I object to that.

The COURT. Objection sustained.

189 Q. What is the coal market?

Mr. WILLIAMS. That question I object to, if the court please. We have had the facts from the witness that there was a market.

Mr. PEARSE. Oh, do not keep rubbing that in. He says he admits coal was bought and sold; he has not said there was a market; he said there was not a market.

Mr. WILLIAMS. Pardon me, the first thing he said was that there was a market.

The COURT. Now, gentlemen, the objection is sustained.

Mr. PEARSE. Do I understand that your honor will not let him define what a market is for coal?

The COURT. I think that we have had a great deal of testimony to the effect that there was a market, the witness has said that there was a coal market, so that I do not see that it is necessary to have it defined.

By Mr. PEARSE:

Q. Do I understand from the answers which you have made to any questions which have been asked you that it is your opinion that there was a market for coal during this period upon which the price of coal could be fixed?

Mr. WILLIAMS. I object to that.

The COURT. I think we are traveling right back again to where we started from.

Q. If you said that there was a market for coal in answer to any question, what did you mean?

Mr. WILLIAMS. I object to that.

The COURT. Objection sustained.

190 Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. s.]

Q. The witnesses for the plaintiff have testified, after giving certain figures as shown by the exhibits, that in their opinion there

was a fair market and fair market price for coal during the period in question. From your experience and familiarity with the coal situation, is that so?

Mr. WILLIAMS. I object to that.

The COURT. Objection sustained.

Mr. PEARSE. If your honor please, I do not want to keep arguing, but why should he be not allowed to express an opinion as well as these other fellows?

The COURT. I take it, Mr. Pearse, that the question here is, Was there a market? They have all said there was a market. The next question is, What was the market price? As to the market price the plaintiff's witnesses vary as between themselves. Now, if you can show by this witness or any other witness that the market price was different from what has been testified to as to the market price—there are variations as between the plaintiff's own witnesses, so that the jury will have to solve that problem—then I would allow this witness to testify as to the incorrectness of the market price as testified to and testify as to his best judgment as to what the market price was.

Mr. WILLIAMS. After he has qualified himself fully as an expert.

The COURT. As an expert on the market.

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By Mr. PEARSE:

Q. During the period in question, while there may have been isolated sales of coal, was there any recognized authority or source to, which the Navy could go in order to ascertain what the price of coal was?

Mr. WILLIAMS. I object.

The COURT. Objection sustained.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. 8.]

The WITNESS. Your honor, may I make a statement bearing upon part of my testimony. I think it is contradictory as it stands.

The COURT. Yes.

The WITNESS. I think that in response to the question by the court as to whether there was a market, during this period, I stated that there was, and later when the court questioned me as to whether there was a market at particular dates I stated at those dates there was not. I just wanted to clear that up. Markets did exist during that whole period but at times during that period there was no market.

By the COURT:

Q. At times during that period there were no sales made?

A. Well, there probably were sales made in such small volume that they were not quoted as a market and not considered as constituting any market. Coal in distress, you understand, sir, as was testified

to yesterday is sold for anything, and by the same token ships on demurrage will pay anything for coal.

Q. Yes. Now, during the periods when the Black Diamond
192 and Seward's Journal and the Coal Trade Journal reported a market price for coal, for spot coal, of this kind and character, during those periods you have no doubt as to the existence of a market, have you?

A. Well, I would say that I could not answer that positively, because we analyzed each time as it came up and there were various quotations given us from the suppliers and from our representatives at Norfolk and at New York and Philadelphia on a number of periods when there was no market.

Q. That was your conclusion?

A. Yes.

Q. You knew, now, that there were actual sales of coal made during all the period at Hampton Roads; would you not say that there was a market for coal at Hampton Roads during that period?

A. It would depend, your honor, entirely on the nature of the sales. As one of the coal operators from whom we got coal in this very district told me before we came up here to this trial—

Q. No.

A. Well, I do not mean to bring in any other testimony, but that is the way that we would consider it, that it depended entirely on the nature of the sales as to whether it could be at all recognized as a market.

Q. Are you not, Commander, giving us the results of the conclusions reached at the Navy Department rather your own opinion with respect to the conditions?

A. No, sir; I am not; I am giving you both, that is, my opinion—

Q. You are giving both?

A. Yes.

Q. Can you separate that which is your opinion and that which is a conclusion of the Navy Department?

A. Regarding markets?

Q. Yes.

A. No, sir.

By Mr. PEARSE:

Q. Why can you not separate them?

A. Because we were in agreement.

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By the COURT:

Q. How do you form your opinions as to markets?

A. From reports from our representatives at tidewater and at New York, Hampton Roads, and Philadelphia; from consultation with operators, with the secretary of the Smokeless Coal Operators' Association, and from trade journals; and there are a great many others that occasionally come up.

Q. Did you, during this period, try to buy coal in the open market?

A. Yes; on several occasions.

Q. Were you able to get it?

A. No, sir; not in the quantities that we asked for, at no time.

Q. That is, you were buying spot coal?

A. On spot coal we made only one purchase of spot coal during the whole period.

Q. Did you attempt during that period to buy spot coal?

A. Only on one occasion.

Q. Why was it that you followed the spot coal market?

A. Why did we follow the spot coal market?

Q. Yes.

A. First, because they are always quoted with the contract market and because the market that we were then interested in was the market on all kinds of sales. There was not very much coal sold during that time of the shortage of coal at tidewater.

Q. Have you followed the actual sales of coal?

A. Yes.

Q. Where did you get your information?

A. From the same sources.

Q. Were you there present going around and seeing what dealers and representatives of dealers were doing with respect to the sale of coal?

A. I went around in Washington; yes.

Q. You did not go around to Hampton Roads, did you?

A. Well, no, sir; because that is under the commandant of that district, who has what we know as a fuel superintendent who reports directly to the office that I am under.

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By Mr. PEARSE:

Q. You say you went around Washington; you went around Washington amongst these various coal dealers whom you are speaking of?

A. Yes.

Q. Whose representatives are in Washington?

A. Yes; and another officer went to Hampton Roads. I did not go to Hampton Roads myself.

Q. But daily reports were sent in to you?

A. They were averaged every day; sometimes more than one a day and sometimes a day would go by without one.

Q. Now, Commander, just to get the figures before the court and jury, what was the price allowed by the Navy in September, 1919?

Mr. WILLIAMS. I do not see the relevancy of that, if the court please.

Mr. PEARSE. You have got to figure out what the jury is going to find.

Mr. WILLIAMS. We admit we received a certain amount.

Mr. PEARSE. State what the amounts are; we have got it here in correspondence.

By the COURT:

Q. Now, Commander, as I understand your testimony—if I am incorrect in it please straighten me out—during the period in question, from September 18th to January 18th, spot coal was bought and sold at Hampton Roads, Virginia, except the times when you understood that there was no supply on hand from which sales could be made; is that so or not?

A. Yes, sir; that is correct.

Q. Now, during the time when coal was not sold, do you or do you not know what the causes were for the lack of the commodity at that time?

A. Yes; I do.

Q. What were those causes?

A. The causes were that the coal was already covered by contract, the principal cause; there was very little free coal because of the shortage of production. The shortage of production was due to the railroad conditions primarily, and during the time, the month of November and the latter part of October, 1919, there was a very serious miners' strike and the switchmen's strike in April, and the orders of the Interstate Commerce Commission to divert coal inland to the Great Lakes, and the hard winter of 1919-1920, all of those caused the supply of free coal to be very limited.

Q. When free coal was available at Hampton Roads there was no difficulty about securing buyers for it?

A. No, sir.

Q. Then when no sales were reported in the papers it was merely due to the fact that there was no supply on hand, was it not?

A. Either that, or that the sales were of such a nature that the trade papers did not care to go on record as to quote them as establishing a market.

Q. That the sales were too small and were rejected by the trade papers for that reason?

A. Too small or under too unusual conditions. For instance, a ship on demurrage might pay up to \$27 for coal in order to get out of port.

Q. Now, where the trade papers give a market price for coal, you think that that price would be satisfactory?

A. I could not say that.

Q. My question, I think, is a little wrong. Let me change that. Where the trade papers give a market price on coal you would regard the editor of the trade paper as feeling that that was the market price, would you not?

A. Undoubtedly he felt so, yes; yes, undoubtedly.

Q. Where men testify here that there was a market price on certain days, was there anything in their testimony which would lead you to believe that the prices which they named were not market prices?

A. Yes.

Q. Can you fix any dates which were given with the amounts of prices testified to which, in your judgment, were not the market prices for coal on those days?

196 A. I could not state that, in our opinion, any of these very high prices were the market prices.

Q. Now, Commander, you have examined the pleadings in these cases, have you not?

A. Yes.

Q. Annexed to the complaint is a schedule showing the dates when coal was taken, showing the fair market value as the plaintiff has testified to it here in court. Have you examined those schedules?

A. Yes.

Q. Now, in what particulars, what precise statements made in those schedules are incorrect?

A. In that they do not represent what the petition calls for, a fair market value.

The COURT. You better strike all of this evidence out, every bit of it, it is entirely irrelevant and incompetent.

Mr. PEARSE. Your honor will allow me an exception to that?

The COURT. Surely.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. s.]

By Mr. PEARSE:

Q. I do not think I have asked this question. In your opinion, was there a free market for the sale of coal from September 19th to January 21, 1921, for the grade of coal involved in this suit?

Mr. WILLIAMS. I object to that.

The COURT. Objection sustained.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. s.]

197 The WITNESS. Your honor, perhaps I did not understand clearly your last question. I would like to explain that. You meant the petition setting forth the fair market value, whether I considered those the fair market value?

The COURT. No.

The WITNESS. Then I would like to have a chance to answer that I did not understand just what you meant.

By Mr. PEARSE:

Q. Take that schedule. What was the price fixed for the sale of coal by the Navy in September, 1919?

Mr. WILLIAMS. If the court please, I was about to say, the plaintiff admits that he had received from the defendant the sum of \$97,354.36 since the bringing of this suit, being the amount allowed by the Navy in accordance with its notion of its duty under the law.

Mr. PEARSE. Does your honor overrule my question?

The COURT. Yes; I do.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

J. L. BODINE, *Judge*. [L. s.]

Mr. WILLIAMS. For delivery down to and including June 2, 1920, and the plaintiff under the defendant's promise to pay withdraws from the case the additional sum of \$46,408.47, which we have figured is the seventy-five per cent of the Navy's figure, and which we understand the Navy shortly will pay us. That is correct, Mr. Pearse, that you are going to pay it, or not?

198 Mr. PEARSE. I don't know whether it is or not; I don't know anything about that. I don't know whether you put the price at \$3.08 or \$3.33.

The WITNESS. \$3.33 for the last deliveries in accordance with what you have said.

Mr. PEARSE. If you will let me go along with this witness you can clear up this issue a little bit, perhaps. There seems to be a dispute as to the amount.

Mr. WILLIAMS. As far as I am concerned you may proceed in order to obtain expedition.

By Mr. PEARSE:

Q. The price fixed by the Navy was how much in September, 1919?

A. \$3.08.

Q. Since that time there has been added anything to that price?

A. Yes.

Q. How much?

A. It has been increased up to the present price of \$4.42 a ton.

Q. What additional allowances have been made on the price of \$3.08?

A. The first increase was to \$3.33 and 4 cents to cover the cost of a wage increase paid by the operators to the miners.

Q. And that is the figure of \$3.33 instead of \$3.08 of which the Government either has or is ready to pay seventy-five per cent, is it?

A. Yes.

Q. As soon as the data is furnished by the plaintiff?

A. Yes.

Mr. WILLIAMS. The data has been furnished long ago, has it not, commander?

The WITNESS. No, sir; not the wage increase data.

Mr. PEARSE. Now, if those figures which you have submitted were based on \$3.33, I suppose they are correct?

199 Mr. WILLIAMS. Mr. Pearse said yesterday they intended to pay us on the basis of \$3.33, and in order not to complicate the record we do not want to include anything which they were going to pay us as far as the principal was concerned.

Mr. PEARSE. That is all.

Mr. WILLIAMS. No cross-examination.

Mr. PEARSE. Defendant rests.

Mr. WILLIAMS. Plaintiff closes.

(Testimony closed.)

Mr. Pearse in behalf of the Government summed up the case to the jury as follows:

Mr. PEARSE. May it please the court and gentlemen of the jury, while it is not within the province of counsel to express any of his personal views either with respect to the case or with respect to the evidence in the case, I do not think I am going beyond my province when I state that I cannot but feel that a tremendous responsibility in a way arises in this case. As you have listened to the testimony of the witnesses and the argument—

The COURT. Mr. Pearse, I might add that I am going to leave only one question for the jury in this case and that is the question as to the market price. It might simplify it, and your rights will be preserved above. You need not confuse the issue to the jurors.

Mr. PEARSE. No, sir; I did not intend to. I could hardly keep from making those few remarks I have already made because it seems to me that the case is of great importance, and as you have observed from the testimony which has been introduced and also by the arguments of counsel, sometimes perhaps a little heated, but unintentionally so, the dispute arises in this case as to whether or not the price fixed by the Navy for the coal of the plaintiff is in fact just compensation.

200 There will be handed to you the figures upon which the suit is based, showing that from the month of September, 1919, to the month of January, 1920, a quantity of coal was taken for the use of the United States Navy. And as, undoubtedly, the court will instruct you, this coal was rightfully taken by the Navy under the authority of the acts of Congress. While it is true that the court does not agree with certain positions which we have taken with respect to this case, nevertheless I presume that the question of fact will be left to the jury as to whether there was or was not a market by which just compensation to be paid to the plaintiff could be measured.

You have heard a great deal about different kinds of coal and different kinds of markets of coal. The chances are that some of you are much more familiar with it than I am, but I say it would appear from the testimony of the witnesses of the plaintiff that they relied upon in establishing a market, what was known as a spot market for export trade, and did not in any way take into consideration any other element which might arise in fixing a market price. You have heard the testimony of these witnesses as to what this spot market was. It is obvious to the most casual listener that there was what might be readily described as a speculative market depending not only on the quantity of coal but also on the demand made by foreign nations for coal arising as a result of the war, and

that notion of the conditions which created the prices which at times were paid for coal in this spot market were not brought about through the usual normal channels of trade where the supply was governed by the demand, and there were not only ready and willing sellers but ready and willing buyers who were not buying under the particular necessities under which the particular buyer was laboring. It is that kind of a market which the plaintiff desires this jury to use as a standard. I think I am not wrong in making the statement that when we consider what just compensation means, we mean not only compensation which is just to the person whose property is taken but also compensation which is just and which, in justice, should be paid by the people or the public whose money pays for this. Under the circumstances I assume it is unnecessary to take much of the time of the court or of your time in going into any lengthy argument, but if I am correct in the assumption that I made at the opening as to the manner in which the court will charge you I cannot but feel that after you have considered all of the evidence in the case, the attitude of the witnesses, the sources of their information, the business in which they are engaged, that you cannot but come to the conclusion that the prices which the Navy fixed under the authority of law amply rewarded the plaintiff whose property was taken, and that this coal company has received just compensation.

Mr. Williams sums up the case to the jury in behalf of the plaintiff as follows:

Mr. WILLIAMS. If it please your honor and gentlemen of the jury, I am sure that I am expressing Mr. Pearse's views as well as my own in saying to you that we appreciate the careful attention which you have given to this very interesting case. Every time I heard the expression "law of supply and demand" during the case I have been reminded of something that happened in Mexico City shortly before I went there not long ago. The legislators there had their own notions about what they could do by laws and they tried to fix the prices for certain commodities, and somehow or another those prices would always get higher and higher, and one of the legislators who had not had very much experience asked what was the cause for it. The reply was that it was the "law of supply and demand." And he said: "That is one of those scientific laws; let us repeal it." And so he introduced a law into the Congress of Mexico for the repeal of the law of supply and demand.

Now, what the Congress of Mexico could not do even the Navy Department of the United States cannot do, namely, repeal the law of supply and demand. It was merely the law of supply and demand that was acting throughout this case.

Now—but what is the case about? May I trouble you, in order that there may be no misunderstanding about the facts, just to read to you the admitted facts in the case as they appear of record?

"The plaintiff, the New River Collieries Company, a corporation created by and existing under the laws of the State of New Jersey and a citizen of and inhabitant within the State and district of New Jersey, claims to recover of the defendant the sum of four hundred and thirty-two thousand two hundred and twenty-one dollars and forty-nine cents (\$432,221.49), with legal interest thereon, as hereinafter set forth, which is justly due and owing by the defendant to plaintiff, by reason of the following:

(1) By virtue of the authority conferred by an act of Congress of the United States, duly approved August 10th, 1917, 40 Stat. 276, the President of the United States, acting through the Navy Department of the United States, commandeered and requisitioned at Newport News and Sewalls Point, Hampton Roads, Virginia, a certain necessary fuel as in said act of Congress set forth, namely, bituminous coal, which belonged to the plaintiff, at the times and in the quantity set forth in a true and correct statement thereof hereto attached and made a part hereof, marked 'Exhibit 1.'

The said coal was commandeered and requisitioned from or through the deputy commissioner of the Tidewater Coal Exchange; the superintendent of terminals of the Virginian Railroad at Sewalls Point, Norfolk, Virginia; the Sewalls Point Coal Exchange; the Virginian Railway; and the Chesapeake & Ohio Coal & Coke Company, the selling agent of the plaintiff.

203 All of the aforesaid coal was received, accepted, retained, and used by the United States of America."

All of the aforesaid coal was received, accepted, retained, and used by the United States of America."

Now, that is all admitted. It is all admitted that these deliveries were made at the times and the sole questions in the case are, whether there was a market and what was the market price for the coal.

I think that his honor will instruct you, and of course you will get your law entirely from the court, that in this case the undisputed evidence will show there was a market. When the first witness who was called by the defendant, as soon as he was asked the question by his honor, who was much wiser in that respect in asking the question than counsel who would not have asked the question as to whether there was a market, he said at once there was a market. And the second witness, in like manner, when he was called, he admitted there was a market. And they are making fine-spun distinctions as to whether there were enough sales on a particular date and so on, when you had before you the evidence set forth in the frankest, most candid manner possible to man, exactly what the transactions were.

What was the character of the witnesses generally who were put on the stand on behalf of the plaintiff? What do you think of those men? Personally I was proud to meet them and proud to see them go on the stand and listen to their testimony. Did you ever see any witnesses who knew the subject matter better and who tried harder

to give you the exact facts and who had the quantities at their finger tips than the witnesses that were produced by us, one after another; men familiar with the trade, one of them thirty-four years' experience in the trade, and they all state not only that there was a market but what were the market prices, and they knew what those market prices were, and that is undisputed testimony in the case. And then they state there were trade journals. And when the representative of the Government goes on the stand he does not dispute the fact that the trade journals principally relied upon by the trade, or the trade journals on which the trade had a right to rely, was authentic, and so on. That was the Black Diamond. And the manager of the Black Diamond, the man who knew about it, who made the actual inquiries, and who reported them, and he presented the graph when he was asked the way in which the market prices changed from time to time, he told you the way in which he did those things, and there is no dispute, and my friend when the question arose as to whether those figures should go in, said: "Yes, I have no objection to those figures from the trade journals," and the record so shows it.

Mr. PEARSE. As such.

Mr. WILLIAMS. As such. He had no objection to those figures going in from the journals. And then the witness said that it was an authentic journal and it was relied on by the trade.

Now, what is the character of the plaintiff's evidence in this case, and it is a very important case. It is important to every citizen who has a right in a free State to respect for all his rights under the law and the Constitution. Our right grows out of the fifth amendment of the Constitution, which I am sure you are proud to know was ratified by the State of New Jersey as the first State to ratify the first ten amendments of the Constitution, was ratified by the State of New Jersey within two months after the resolution of Congress submitting it to the States. It was ratified on November 20, 1789. I do not claim credit especially for remembering that date because it happened to be the anniversary of my birthday. The State of New Jersey ratified this amendment, which says, and I will read the whole amendment:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Now, you know what our forefathers thought of the sacredness of human rights in property. And it is all nonsense to talk about

property rights. All rights are rights in things or in respect of persons. They are human rights, every one of them, and you see what our forefathers thought of the sacredness of this particular kind of right when they put it in this very same clause with all those sacred things from the old English history, embodying the Magna Charta, and they put in that fifth amendment the provisions which would protect the citizen for all time against despotism on the part of the Government.

Now, what is just compensation? Is it to be determined by Congress? No. The Supreme Court of the United States, the last tribunal as to what the Constitution means, has flatly said it is not for Congress to say what just compensation means. It is a judicial question for the judge and for the jury to decide. Can it be decided by any department of the Government as to what just compensation means? No. It is solely a question, a judicial question. And when you come to the question as to what just compensation means, the cases from the beginning of time are absolutely uniform in the Supreme Court of the United States, in every appellate court of this country, to the effect that where there is a market for property the market price of that property is the only measure of just compensation. And it was in that state of the law, every one knowing the law, every one knowing the Constitution, that the Navy Department of the United States undertook to say: "No; we will not give you that, we will not live under that, we will not act in accordance with that."

Was the plaintiff right in saying—was the plaintiff's standing for the people interested in this company right in saying—that it would stand upon its constitutional and legal rights? Heaven forbid that it should be otherwise, gentlemen, when a citizen, for whatever reason, will hesitate to insist upon his just measure of protection under the Constitution and the law.

If you had owned property and the Government had come to you and said: "Won't you give this to us for less than it is worth; won't you give it to us for less than the market price?" it might have been one thing. But is it conceivable that the greatest and the proudest Government on the face of the earth should so demean itself as to say to any citizen: "We want you to give this to us for something less than the law says it is worth and that common sense says it is worth."

Now, what is the common sense in the case? And I would be perfectly willing to rest on the common sense of the case, but in this case the Constitution and every decision of the courts is unanimously in favor of the common sense of the case.

How can you find what a thing is worth? How do you find value? I have been looking through this thing, and there was only one country in the world that had any other concept of value than market value when there was a market, and curiously enough that was Germany. Is it not odd? Now, there they have the doctrine

that when the Government wants a thing to-day that is the thing; that that has to be done no matter what the citizen says; and that is not the doctrine in this country. The doctrine in this
207 country is that the citizen is a free man living in a free State and is entitled to all his civil liberties. He is entitled to his life and his liberty and the pursuit of happiness. And when that was put in the Declaration of Independence and put in the fifth amendment within a year or two, this provision, it was with regard to the life, liberty, and property without due process of law. That is what they meant in large part by pursuit of happiness, because after you have had your life protected and your liberty protected, your pursuit of happiness means your ability to save, to work and save and lay something up for old age and the protection of the loved ones, and the capacity to do good with the money you have earned, and after all that is one of the greatest pursuits of happiness that is possible to man, and all of that was crystallized in the fifth amendment of the Constitution and is a part of the liberty of every citizen.

Now, I started out in this case with the full intent not to say a great many things that had been in my mind for a long time, because I have had to visit Washington in respect to a number of matters, and I had even been told down in Washington, "Why, you are an old-fashioned person, are you not; you still believe in the Constitution of the United States."

I do believe in the Constitution of the United States, and I would that every gentleman on the jury, when he was called to jury service, was sworn not merely to render a true verdict, but would also be sworn to support and maintain and defend the Constitution of the United States and a true verdict render. Because I believe you would send every man out of the room a better citizen, more intent upon obeying the law, and more anxious to give fealty to the Government, which is such a good Government, the best Government in the world.

Now, what was the character of the testimony that we introduced, gentlemen, to show what these market prices were? I do not
208 know how many cases you gentlemen have been sitting in, if there has ever been before you in another case a plaintiff who has laid all the cards on the table and has shown you exactly what took place. There was no necessary reason at all for making up this Exhibit 1. We said we were going to give you all the information there is that has any information in our power, and we gave you all the facts. We gave you sales and dates that did not really have anything to do with the case except as showing there were sales, because there was no activity during those days, and we made you up another exhibit which gave all the facts that we had, and we called witnesses, some of whom said that there were variations on some of the dates where we were too low, a little too low, and some of them said we were a little too high on some of those dates.

Gentlemen, when Mr. Carpenter went on the stand, didn't you feel that he was the best qualified man of all to say what was the real market price? Is there any doubt that Mr. Carpenter is an intelligent man and an experienced man, and a man whose whole desire is to tell the truth, the whole truth, and nothing but the truth. A man who has had thirty-four years' experience and above all the man who knew these transactions. It was his coal, or the company's coal that he regarded as his coal for the purposes of this case that was in question, and he, with his knowledge of the market, in good faith and to the best of his ability fixed the prices which are mentioned in our bills of particulars. I will not ask to amend any single item of them to increase the price in accordance with the judgment or weight of the testimony. I will ask you gentlemen to take Mr. Carpenter's testimony, buttressed as it is by the uncontradicted testimony of as able and intelligent and honest a set of witnesses as it has ever been my pleasure to see, that the prices which are contained in these statements and claimed are the fair market prices on the dates in question.

209 There is only one other matter, gentlemen, and I have done.

Under the law I have asked the court to charge you that the plaintiff is entitled to be put in the same position as if its property had not been commandeered. In other words, what the plaintiff would have gotten in gold dollars on the day that its property was taken, at the prices mentioned.

Now, there has been a great deal of delay. Whether it was avoidable or unavoidable does not make any difference. Of course, a citizen always feels that the processes of a bureaucracy are unduly slow, and, of course, we will feel perhaps after we get an act of Congress years hence that the processes of the Government have been unusually slow, but that is not the question. The question is, How are you going to make the plaintiff whole? If any of you have property that is taken from you at a certain date so that you no longer have any enjoyment, and you could have sold that property on that date, you should be made whole unless when they come to pay you for it they pay you something for the fact that they detained that property from you, and have not paid you in the meantime anything for the use of the property. And so I ask the court to charge you that we are entitled from the dates of these deliveries to the difference between the amount paid, the amount of damages for detention, not as interest, but not exceeding six per cent, which I believe is the legal rate in this State.

210

The court's charge.

BODINE, D. J.

Gentlemen of the jury, we are about to close what has been no doubt to most of you a most tiresome trial, and we are all satisfied that although there has been a great deal of argument back and forth as to what the law was that that question will sometime be

solved to the entire satisfaction of both the parties to this suit, and necessarily to the entire satisfaction of you gentlemen.

So the question now is to follow what I have to say—if I am wrong in the law as I apprehend it I will be straightened out by either party who will be injured by my acts in the matter—the sole question now is what I apprehend to be the law and it will be your duty to follow it.

Now, the plaintiff has brought these three suits which have been tried together to recover just compensation for coal which was commandeered by the United States Navy from September 18, 1919, to January 18, 1921, inclusive.

The act under which the suits are brought required the payment of seventy-five per cent of the compensation, which the Government fixed as just, and permits the plaintiff whose property is taken to sue for such balance which added to the seventy-five per cent would amount to what in the judgment of the jury amounts to just compensation in the premises.

In the first suit the seventy-five per cent of the sum fixed by the Government has been paid.

Mr. PEARSE. I believe there are two items that have not been paid.

Mr. SMITH. The last three items in the last suit have not been paid, and in the second and third suits they have been paid, but the computations we gave you to cover that.

The COURT. So you would deduct not only this sum which 211 has been paid but also the seventy-five per cent of the sum which has been awarded by the Government as just compensation in these actions and which the plaintiff is satisfied from assurances which have been made to it will be paid. So you would deduct the sum of \$46,408.47 and the sum of \$97,354.56, or a total deduction of \$143,763.03 from such verdict as you might find the plaintiff entitled to recover.

The pleadings in these cases, and it is admitted, show that the quantities of coal shown in the schedules annexed to the pleadings were commandeered by the Navy on the dates shown in the schedules. The commandeering was in pursuance of the act of Congress of August 10, 1917, 40 Stat. at Large, 276, generally known as the Lever Act.

The Government had a legal right to take this coal, but under the Constitution and laws, it was the duty of the Government to pay the plaintiff just compensation therefor.

The issue between the parties is simply what is just compensation. It is not disputed that the coal was taken. The time it was taken and the quantities taken are admitted facts.

The plaintiff's proofs show that at Hampton Roads at the time in question there was a market for the kind and quality of coal mined by it; that many coal operators shipped their coal there. The coal was classified by heat units which it was capable of producing, and plaintiff's coal and coal of a similar kind and character was

shipped into a reservoir known as pool 1, and that this coal in pool 1 had a market price which fluctuated as the supply and demand varied. The market price was affected by the supply and demand. There were numerous producers of coal whose coal was in pool 1 and numberless buyers who desired to obtain this coal.

The plaintiff's proofs further show that they could have sold this coal for export, and that they not only could have sold the
212 coal which the Navy Department took for this purpose, but that they had sold and did sell during all this period a quantity of coal for export trade.

They have also called witnesses to show that there was a market price at Hampton Roads during all the times of the taking of this coal for coal of this kind and quality. These witnesses have told you how they determined as experts what the market price was.

The plaintiff has introduced in evidence two exhibits which have been received in evidence for convenience. The first exhibit was made by Mr. Carpenter, a witness called by them, who testified as to the market price during the dates in question of coal at Hampton Roads. The first one shows the dates, the quantities, and the price of actual sales of coal made by the plaintiff during the period in question. The second schedule shows the dates of the taking of the coal in question, the quantity of tons taken, the number of the invoice, and Mr. Carpenter's estimate of the market price of this coal because it is conceded in this case that the market price is the market price f. o. b. mines, the Navy having paid the freight on the coal at the time of its taking.

Then Mr. Carpenter also has codified from the first exhibit the spot sales of coal made by the plaintiff at about the time of the commandeering by the Navy of the coal in question. He then shows in parallel columns the prices quoted for similar coal or like coal in the Black Diamond, Seward's Journal, and the Coal Trade Journal, which the testimony shows were journals used in the coal trade and were recognized as authoritative means for conveying market information with respect to prices prevailing there at Hampton Roads at the time of the taking in question.

Then other witnesses were called by the plaintiff to testify from their knowledge and experience with respect to the market value of this coal at the time of the seizures. As I recall—any of my
recollection of the evidence is not to be controlling with you—

213 some of these witnesses thought that the prices given you by Mr. Carpenter during the summer of 1920 were high and that the actual prices were from fifty cents to one dollar lower. Now, that would be a circumstance for you to consider in determining what was the fair market price of this coal in question.

Then there was testimony that during the latter part of the summer and the early fall of 1920 the prices for coal that could be obtained and were bought in the open market were higher than those testified to by Mr. Carpenter. From all of the evidence on the subject as to

what the market price was, the fair market price of the coal at the time of the taking you will find your verdict.

As to the defendant's proof, there is no proof in the case which controverts the existence of a market for coal at Hampton Roads at the times in question. The first witness called by the defendant testified that there was a market, that the controlling factors were supply and demand. I have stricken the testimony of the naval officer from the record with respect to the existence of a market because I did not feel that it was competent upon the subject matter. If I am wrong in that there exists a tribunal to right that wrong, but you cannot consider the testimony as he gave it here on the witness stand with respect to that question. So from the proofs in the case, they being uncontroverted, you would find that there was a market for coal at Hampton Roads at the time of the taking of this coal, and then it will be a question for you to determine what was the fair market price of that coal and you will determine from the testimony of the witnesses adduced here.

It appears from the proofs that on some of the days in-question when coal was commandeered that some of the trade journals, or some of the persons testifying, made no sales of coal on that day, and so where you are finding what the fair price of coal was on the days in question, if there were no evidence before you from which
214 you could find actual sales, then you will consider the prices quoted at about the time of the taking because they will have a bearing on fixing and determining what was the fair market price as to the time of the taking.

I have excluded a great deal of the defendant's offer to prove what it claimed was just compensation. It has offered to prove that it fixes the price of coal on the basis of the cost of production and a reasonable profit thereon. I have excluded all that and limited your determination to finding what was the fair market price from the evidence adduced here of the coal taken by the Navy Department on the dates on which it was taken.

You, of course, know that it was necessary for the preservation of the Government that it should have power to take coal and other necessities as it needed. But, as counsel for the plaintiff has called to your attention, our Constitution provides that coal cannot be taken without giving just compensation. And just what is just compensation is not what a bureau head or another department of the Government may say is a fair price, nor what Congress may say is a fair price, but courts and juries alone can say what is fair compensation between the Government and a citizen with respect to property that has been taken so long as the Constitution remains. And the courts have said that where an article was traded in on a market that its fair market price was the measure of just compensation, and this must be so because if one citizen may sell his property in the open market at a given figure, even though the figure be high, just compensation for the citizen whose property is taken must be the same price as his competitor is obtaining in the open market. Other-

wise, a department of the Government by taking one man's property and not taking another's might enrich one citizen and impoverish another. Just compensation for property taken by the Government must necessarily be the same compensation as the property would

have sold for in the market to some one other than the Government. If its value in the market were so many dollars just compensation for the property when taken by the Government is the same amount of dollars as it would have brought in the market.

Because the proofs show that this coal could have been sold in the export market, and that fact is not controverted, and the export market was higher than the domestic market, I have excluded proof to show that the domestic market was lower. A citizen whose property is taken is entitled to compensation for the most profitable market to which the property could have been put, in a general sense.

The plaintiff's proofs are not uniform, as I before pointed out, to what the market price was upon the days in question. And it will be your duty from the evidence to find what the market price was for the coal for export on the days on which this coal was taken.

You will have before you in the jury room the plaintiff's exhibits. You will bear in mind that there is testimony to show that some of the prices set forth in these exhibits show the amount testified to by Mr. Carpenter are in some instances high and in some instances low. It will be your duty from all the evidence with respect to the market prices prevailing there at Hampton Roads to fix a fair market price as of the dates when the coal in question was taken.

There is one thing more. The just compensation contemplated by the Constitution requires that the citizen shall be made whole as of the date of the taking of his property by the Government. It is the duty of the Government as of this date of the taking to pay the full market value of the goods taken. And if payment is withheld or delayed the citizen can not be made whole unless he is given something for the period of detention. It is your duty, therefore, to

add to the amount which you may find as the fair market value of the various deliveries of coal at the time of such deliveries will be your duty to add not exceeding six per cent interest on the sum which you may find. You must also take into consideration the sum of money which I have before referred to as having been paid by the Government to the plaintiff, and, of course, as to that sum interest would not run, but interest would run from the date of the taking of the coal.

I will not charge the other requests of the plaintiff and allow no exception.

(Plaintiff's requests to charge are as follows:)

1. Under all the evidence your verdict must be for plaintiff.
2. Under the Constitution of the United States of America plaintiff is entitled to "just compensation" for its private property.

commandeered by the Government. Constitution of the United States, fifth amendment.

3. The true measure of just compensation is fair market value—precisely the same measure which the law fixes in practically all cases arising between citizens, or between citizens and the Government respecting the value of property. In this case the measure is the fair market value of plaintiff's coal for the best available uses and purposes.

U. S. v. Chandler-Dunbar Co., 229 U. S. 53 (1912);

Boom Co. v. Patterson, 98 U. S. 403 (1878);

Five Tracts of Land v. U. S., 101 Fed. 661 (1900);

U. S. v. First Nat'l Bank, 250 Fed. 299 (1918);

C. G. Blake Co. v. U. S., U. S. D. C. Southern Dist. of Ohio (March, 1921);

National City Bank v. U. S., U. S. D. C. Southern Dist. of New York (March, 1921).

4. For example, if the contract were made for the sale of coal for delivery during the period now in question and the seller failed to deliver, the measure of damages would be the difference between the contract price and the market price at the time and place of delivery.

5. In like manner, if one citizen ordered coal from another citizen without insisting on the naming of a price, the seller is entitled to the ruling market price which is being paid in other transactions at the time and place.

6. Where there are no transactions on the very day, then sales made in the open market within a reasonable time may be taken into consideration in fixing the market price.

7. Where no sales are made at the place in question, sales made at other places where there is a market may be taken into consideration, allowing, however, any difference in freight rates. What is the fair market value on certain dates, or in certain places, is a matter of expert testimony to be given by those who, by reason of their training and familiarity with the market and market conditions, are best able to express an opinion in respect of market value.

8. The just compensation contemplated by the Constitution requires that the citizen shall be made whole as of the date of the taking of his property by the Government. It is the duty of the Government as of the date of the taking to pay the fair market value of the goods taken and if payment is withheld or delayed the citizen can not be made whole unless he is given damages for the period of the various deliveries of the coal at the time and place of such deliveries, damages for detention not exceeding six per centum on the various items from the date of taking by the Government to the date of your verdict.

Monongahela Navigation Co. v. U. S., 148 U. S. 512 (1892);

U. S. v. Town of Hahant, 163 Fed. 520 (1907);

Shoemaker v. U. S., 147 U. S. 282, 320 (1893);

U. S. v. First National Bank, 250 Fed. 299 (1918) ;

U. S. v. Rogers, 257 Fed. 397 (1919).

218 9. In awarding to plaintiff the fair market value of the commandeered and making such award as of the date of commandeering, you will be doing no more than putting plaintiff in the same position in which it would have been if there had been no commandeering, since plaintiff could have disposed readily of the coal at the then current market prices and obtained immediate cash for the same. Any other possible measure of damage would result in wrong and hardship to the citizen whose property happened to be commandeered as compared with another citizen who was left free to obtain gold dollars at market prices for his own property of the same character. No hardship results to the Government, for, presumably in buying in the open market the Government would have been obliged to pay the market price and if the Government could have obtained a lower price by making a contract in advance, the responsibility must be borne by the Government.

Monongahela Nav. Co. v. U. S., 148 U. S. 312 (1892) ;

Kankanud v. U. S., 244 Fed. 923 (1917) ;

U. S. v. Town of Hahant, 153 Fed. 520 (1907) ;

U. S. v. Chandler-Dunbar Co., 229 U. S. (1912).

Plaintiff's counsel prays an exception to the refusal to charge the above requests, which exception is hereby allowed and sealed accordingly.

(Sealed)

The Court. I will not charge the defendant's requests, but I will allow an exception for the failure to charge them in toto.

1. The market price at which coal was sold by the plaintiff for export at "spot" prices; that is, for prices which contemplated immediate delivery without any previous order or contract upon which the time and place of delivery were based, and the price to be paid, is not alone the basis upon which just compensation should be determined.

2. The price which the plaintiff could get for its coal at the time and place for export uses, and for shipping going to foreign ports at about the same time or place when and where the coal was taken by the defendant, is not binding upon the jury in determining the value of the coal taken, although it may be evidence which may be considered in arriving at what the jury believe from all of the evidence in the case, to be just compensation for the coal taken.

3. The market price of an article is only a means of arriving at just compensation. It is not in itself the value of the article, but is only evidence of value upon which just compensation may be based or determined. The law adopts fair market price as a natural inference of fact, but not as a conclusive legal presumption.

4. The Constitution protects persons with respect to the taking of private property for public use, and guarantees that for all prop-

taken for public uses, just compensation shall be paid. This compensation, however, must be just, not only to the person whose property is taken, but also to the public which is to pay for it.

5. Just compensation means full and fair equivalent for the loss sustained for the taking for public uses, the exercise of the power of taking public property for public use being necessary for the public good, and all property being held subject to the exercise of this power when and as the public good requires it, it would be unjust to the public that it should be required to pay the owner more than a fair indemnity for the loss he sustained by the appropriation of his property for the general public good.

6. To arrive at what is just compensation, the interests of the public and of the owner of the property and of all the circumstances of the particular appropriation should be taken into consideration, and in determining what is just compensation, the price for which the property might be sold for a particular purpose is not conclusive evidence.

7. In determining what is just compensation, the jury may consider not only the price which the coal would bring for export trade at "spot," but also the prices fixed by the Navy and the manner in which, and the sources from which its information was obtained in fixing these prices; for example, the cost of production plus a reasonable profit, bearing in mind that this price should be not only just to the supplier, but also just to the Government.

8. In determining what is just compensation, the jury may consider the price which the coal would bring on the basis of contracts for the sale of coal covering definite periods of time, also the prices at which coal could be sold for "spot" for domestic use.

9. In determining what is just compensation, the jury may consider any evidence which may be produced to show that the prices obtained by plaintiff for coal, other than the coal taken at the same time and place, were affected by restrictions upon the quantity which might be sold, and any other evidence which may be produced to show that the market was not free and unrestricted.

10. In determining the amount of damages to be awarded, the plaintiff is not entitled to interest, as interest is only awarded against the Government of the United States where the Government has expressly contracted to pay interest, or where the particular statute under which suit is brought authorizes the recovery of interest.

11. The burden of proof is upon the plaintiff to show that the compensation fixed by the President in accordance with the provisions of the law governing the requisitions of this kind is not just compensation.

12. In taking into consideration the evidence as to prices at which the coal was sold by the plaintiff and others, the plaintiff must show that the prices obtained were such as would obtain in a free, open, and unrestricted market, and that the buyers did not pay the price asked by the sellers of coal, through force of circumstances over which they had no control.

13. The Government of the United States is not to be penalized for the taking of the coal of the plaintiff and is not required to pay other than a reasonable price for the coal taken; that is, a price which will be fair to the public who pay for the coal and which will reasonably compensate the plaintiff whose coal has been taken.

14. The price to be paid for the coal taken is not the highest price which the plaintiff could obtain under any circumstances, but only the fair market value under all the circumstances and for all available uses and purposes for which the coal might be used.

15. While the price which the plaintiff might obtain for its coal in a market may be evidence upon which to base just compensation the plaintiff must first show that there was free competition in the market under normal circumstances, with a seller not forced to sell and a buyer not compelled to buy.

In the absence of this proof, the price obtained is not a standard upon which just compensation may be based, as the coal which was taken by the Government from the plaintiff was necessary for the maintenance of the Navy of the United States. The measure of just compensation which the Government must pay the plaintiff should not be based upon exorbitant prices resulting from a shortage due to the Government's restrictions placed upon the market for the protection of its citizens, thereby affecting the stable conditions of the market, and preventing free and open market conditions.

16. In determining the question as to whether or not there existed a fair market during the period in question, the jury may consider the range of the alleged market price, namely, prices varying from \$5 to \$16 as set forth in the bill of complaint.

Government's counsel prays an exception to the refusal to grant the above requests, which exception is hereby allowed and sealed accordingly.

J. L. BODINE, Judge. [L.S.]

(Discussion off the record.)

The COURT. Gentlemen, inadvertently I said with respect to the interest which you would allow to the plaintiff something about interest on the delay in payment. Now, that would not be interest, because interest does not generally run against the Government of the United States, but it would be a sum which you might allow not to exceed the lawful interest as damages for the delay. That is something essential, some necessary part of the verdict necessary to make just compensation.

I will allow an exception to the Government as to each and every part and parcel of my charge.

Mr. PEARSE. I do not object to the whole of it, sir. There are one or two points that I would like to mention unless you think they cover the situation.

The COURT. Yes; you may have an exception to everything.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

J. L. BODINE, Judge. [L. s.]

Mr. WILLIAMS. I have the figures here including the damage for detention showing the final figures and the way in which the amount is made up.

Mr. PEARSE. I object to that.

223 The COURT. I think that you may hand to the jury a statement of the sum of \$46,408.47 with the date of payment of that sum. Then I think you may hand to the jury a statement showing the figure \$97,354.56. Now, I cannot tell which sum has not been paid. That must be settled, and as to those sums of course no compensation can be added for delay in payment because they have been already paid or they are accepted as paid by the plaintiff. So that from whatever sum you find you would deduct the \$46,408.47 and the \$97,354.56, making a total of \$143,763.03. And because you cannot carry those figures in your mind I will permit the clerk to hand a statement of those figures to the foreman, and as to those there will be no interest.

Mr. PEARSE. Perhaps I misunderstood what was suggested. So far as damages for detention are concerned, I do not understand that either the court suggests or counsel claims that any so-called damages or interest is to be calculated on the seventy-five per cent?

The COURT. Oh, no.

Mr. PEARSE. Whether paid or unpaid?

The COURT. Oh, no.

Mr. WILLIAMS. Up to the date of payment.

Mr. PEARSE. We can show you where you have refused to take it.

The COURT. Now, gentlemen, you are confusing the issue. It cannot go to the jury except as I have suggested. They must make their deductions with respect to it, following the instructions which I have generally given them.

Mr. PEARSE. Yes, sir.

(The jury thereupon retired.)

(Discussion between court and counsel.)

The COURT. I understand that it is stipulated that the typewritten exhibits may be sent to the jury room. If you gentlemen will hand those to the clerk he will hand them to the bailiff to take up with him.

224 Mr. WILLIAMS. Will your honor allow me an exception to the refusal to allow us damages for the detention upon the amount paid by the Government from the dates of the commandeering to the dates of payment?

The COURT. You may show the amounts of money that are to be deducted from the amount claimed. If you show those dates of payment and the amounts, then the jury can be instructed that they deduct them from the sum which they would find. We can get the jury here and make that clear to them.

Mr. WILLIAMS. That is what we did in the statement which prepared and this is exactly an accounting which I think your honor will agree with me—took the value of the particular delivery, the value of the succeeding delivery, and at the date of payment deducted the amount of the payment from the preceding delivery.

The COURT. Now, gentlemen, there is another thing. The whole issue in this case as I have submitted to the jury is simply this: What was the fair market price from the evidence adduced. Now let the jury find the fair market price; that is a matter of calculation by them. Then the addition of the other sums is a mathematical problem that can be solved by almost anyone.

Mr. WILLIAMS. If they were to give a special verdict saying that the fair market prices on those dates were so and so then your honor could mould the verdict in accordance with your honor's judgment.

The COURT. Can that be done?

Mr. WILLIAMS. A special verdict as to the market prices on those dates.

Mr. PEARSE. That would be the method by which the jury would arrive at their conclusion. Then they must fit that sum not to exceed six per cent, which they may find would be damages for delay in payment.

Mr. WILLIAMS. The court, of course, could do that as a matter of calculation afterwards.

225 The COURT. Yes; they fix the rate.

Mr. COBEY. May I state that we did send checks to the company?

Mr. PEARSE. They are not for the seventy-five per cent.

Mr. COBEY. I did not think you would want to allow interest on that.

The COURT. Oh, no. That is where all our trouble came from, the seventy-five per cent. Let the jury come down and we will do that.

(The jury thereupon returned and were further instructed by the court as follows:)

The COURT. Gentlemen of the jury, counsel in this case has reached a solution which may help you in arriving at a verdict. I am requested to charge you to find a special verdict for what you may find to be the fair market price of the coal commandeered on each one of the respective dates. Now, you will have the exhibits and you will bear in mind what I told you with respect to the exhibits. Then you will consider the further question as to whether you will add to that fair market price damages for the delay incident to the payment of the sum which you will find to be the fair market prices on those respective dates. And the solution of that question will also be contained on the special verdict which you will render and give to the clerk. Then from those sums, or the total of the sums, may be deducted by the court the sums of money which have been paid by the Government to the plaintiff and the additional sums for the damages with respect to those sums which you may find.

that there simply remains for you two questions—what was the fair market value of the coal in question on the respective dates to be determined from the evidence, and, second, will you add to that fair market value a sum of money as damages for the detention of this money by the Government or not?

226 JUROR NUMBER FIVE. Do I understand that we are not to deduct on the total verdict that we give the two amounts that have been paid on account?

The COURT. You are not to consider those because your verdict by agreement is to be a special verdict and the court will deduct those sums.

The reason for this is that it will relieve you of the necessity for doing a great deal of calculation because you can fix a sum per ton as the fair market value as of the particular dates given. You can find that from the evidence which has been brought out before you and then so on down the list and that ends your labors except for determining the question as to whether you will or will not allow damages by reason of the detention of this money in an amount not in excess of six per cent.

Mr. WILLIAMS. In other words, as I understand the jury is not to calculate it, but merely signify.

The COURT. Yes; you are not to calculate it.

(The jury thereupon retired.)

Mr. PEARSE. If the court please, I presume that the time for argument has passed, but the defendant is certainly confronted with what I consider a rather unfair position before the jury. We offered to present to the court figures showing what the Government allowed and the figures that the plaintiff claimed for purposes of comparison. Now, that is absolutely eliminated from all consideration by the jury by the absence of the sheet for comparison.

The COURT. As a matter of law, Mr. Pearse, I think my charge so shows, I excluded from consideration of the jury everything except the question of the fair market value as testified to by those who testified with respect to transactions on that Hampton Roads market. Now, if I am wrong in the trial of this case I am wrong in that.

That is the whole criterion of everything that I have been 227 trying to do. And it seems to me, and this is part of the record, that if you say to the Circuit Court of Appeals that that is what I had in mind, and for that reason everything else was excluded, if I am wrong on that why we will have the pleasure of trying the case over again.

Mr. PEARSE. Very well, sir.

(Endorsed:) United States District Court, District of New Jersey—Before: Hon. Joseph L. Bodine, D. J., and a jury. The New River Collieries Company, a corporation created by and existing under the laws of the State of New Jersey and a citizen and inhabitant within the said State and district, against the United States

of America, Trenton, N. J., March 29th, 1921. Bill of exceptions
Filed May 25, 1921. George T. Cranmer, clerk.

228 United States District Court, District of New Jersey.

NEW RIVER COLLIERIES COMPANY,
plaintiff (defendant in error),
vs.
UNITED STATES OF AMERICA, DE-
fendant (plaintiff in error).

Assignments of error. (The
cases consolidated).

*Assignments of error of the defendant, The United States of
America.*

Filed May 25, 1921.

And said United States of America, defendant and plain-
in error, by Elmer H. Geran, United States attorney, and Freder-
M. P. Pearse, assistant United States attorney, come and say th
in the record and proceedings and also in the matters contained
the bill of exceptions, and in the refusal to charge the jury as
requested by the defendant in said cause by the said District Court
the United States for the District of New Jersey, there is manife
error in this, to wit:

1. The court erred in the admission of evidence offered by th
plaintiff, full substance of which is as follows:

"By Mr. WILLIAMS:

Q. Direct your attention again, Mr. Carpenter, to the stat
ment which you have prepared. Will you please explain to th
court and jury just what your statement shows with regard
the figures?

Mr. PEARSE. If your honor please, I must object to usin
229 this statement, which on its face refers to spot sales.
still insist that spot sales are not the proper measure
just compensation where the coal is taken for domestic use.
furthermore, until it is shown under what terms the Governmen
took the coal and what were the forms of the requisitioning
how frequently the coal was required, and in what quantities
was required, this witness it not in a position to testify as
any figures so far as the market value is concerned.

Mr. WILLIAMS. If the court please, the facts appear undispute
on the record as to how the coal was taken.

Mr. PEARSE. It was taken, that is all.

Mr. WILLIAMS. It shows the dates on which it was taken, and th
dates on which they were taken were the dates which fixed the ques-
tion as to the market price; at any rate, it certainly is some evidence

of value to show what others were willing to pay and actually did pay for coal on the days in question.

The Court. The plaintiff alleges that by virtue of the authority conferred by the President of the United States, and so forth and so on, it seems to me that you come directly to the issue as to what was the just compensation for the coal, and I will receive at this time the evidence of this witness with respect to the market for spot coal, allowing the Government an exception.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Signed.)"

230 2. The court erred in the admission of evidence offered by the plaintiff, full substance of which is as follows:

" Mr. WILLIAMS:

Q. Will you proceed, Mr. Carpenter, and explain this statement, just what it means?

A. Just what is your question, if you please?

Q. Explain the statement and what it means.

A. This statement shows opposite the dates of each month headed the number of tons of coal sold spot and the price obtained therefor, f. o. b. cars mines. For instance, on September 2d we sold 2,157 tons of coal for \$5.50. On September 16th, 1,610 tons of coal for \$4.74.

Mr. PEARSE. I was not listening to the witness. I did not know that he was starting in to testify. If your honor please, I hope you will pardon me for objecting so often, but it seems to me that at this point this gets right to the crux of the very case we are on. This witness is testifying with respect to certain prices that his company received for coal on certain occasions and on certain dates. Now, I do not understand that that is a method by which a market is established. These are isolated prices at which coal was sold by this particular company. Now, the contention of the other side is that just compensation, as I understand it, is to be based upon the fair market value of the goods taken. That fair market value is certainly not established by testimony of individual sales by the particular company in question.

The Court. I think that is part of the proof. I do not think it is the whole proof. I do not imagine that Mr. Williams contends that it is the whole proof on the market price. But
231 if you were going into the question of the market price of real estate you would call an expert in real estate; that is, a man who had bought and sold real estate on his own account and on the account of others, and then he would testify as to what price he believed to be a fair price for a certain piece of property which would be based upon the price that was obtained for some similarly situated property at or around the time that

he was fixing the price. Now, this witness says, 'I am the sales officer of this company. I have kept track of the price that has been obtained by our company from the sale of coal spot during this period of time. I will tell you just what we got every time we sold during this entire period. I also keep track of what other people obtained.'

Now, I presume that presently Mr. Williams will come to the price which others obtained and then he may follow that up with testimony from other persons similarly situated to show what they obtained, and then the jury from all the testimony would look into the question as to what the market was. It is only evidential; it is not the whole story.

Mr. PEARSE. Then may I reserve my right to strike out the testimony of this witness with respect to these individual sales if the plaintiff does not back it up by the testimony of other companies that have sold coal at these prices?

The COURT. Well, other testimony with respect to prices.

Mr. WILLIAMS. I would suppose, sir, that as in the case of the sale of real estate that this is merely a matter for expert testimony. The witness is offered as an expert. He says he was familiar with other people's sales; he was familiar with the market, and he proposes to say what the fair market prices were on deliveries by way of the fairest possible terms, to qualify him as a witness, to show that he himself had taken part in a number of sales. I believe that should be reserved for cross-examination. I believe he would be entirely competent to say: 'Did you know the market, were you familiar with the market, did you have transactions during this period?' and if he said, 'Yes,' 'Are you able to give us the market prices?'—for him then to say, 'In my opinion these were the fair market prices.'

Mr. PEARSE. I think my reservation was allowed.

The COURT. No; I took it that this was a step in the proof. I do not think that the court has any control over counsel as to the number of witnesses that he may call. It may be that counsel intends to rest on the testimony of this one witness, and if so that goes to the weight of the evidence, but not as to its admissibility.

Mr. PEARSE. In order to keep the record clear, then I understand that your honor overrules my request to subsequently make a motion to strike out this testimony?

The COURT. I could not strike out testimony that is relevant.

Mr. PEARSE. I do not think it is relevant; that is my trouble. Exception."

3. The court erred in the admission of evidence offered by the plaintiff, full substance of which is as follows:

"By Mr. WILLIAMS:

233 Q. Are you able from your knowledge of the market and the sales made by you to say what were the fair market prices on this quality of coal on these various dates?

A. In my judgment——

Mr. PEARSE. I object to that question until we find what market price they are talking about, whether it is spot market or contract market or the market for export trade or the market for domestic trade.

The COURT. Is not that, Mr. Pearse, really a matter for cross-examination?

Mr. PEARSE. Perhaps it is.

The COURT. It is a matter for the defense to lay its foundation by the cross-examination of this witness. Now, if this witness has not qualified as to his ability to testify as to the market, or if it develops that he is testifying as to a particular market or a market which is not applicable to the matter in suit, why then a different matter will develop.

Mr. PEARSE. The question is incomprehensive; that is what I am objecting to; that is the trouble with the whole situation in a nutshell.

Mr. WILLIAMS. We can take each price at each date.

Mr. PEARSE. I am not worrying about that.

Mr. WILLIAMS. It merely means dragging out the thing indefinitely if you do that, because the same thing applies as to each date.

The COURT. I am with you so far, Mr. Williams.

Mr. WILLIAMS. If my friend wishes to cross-examine any further as to his qualifications as an expert, of course he is offered for that purpose.

Mr. PEARSE. I will take care of that later.

234 Mr. WILLIAMS. It is usual to cross-examine at this time.

Q. Mr. Carpenter, for the purpose of the record will you please fix what you regard as the fair market value of this character of coal on the dates in question? You have before you an exhibit which you prepared which you described.

A. September 18, 1919——

Mr. PEARSE. I desire to interpose my former objection to this testimony and take an exception.

The COURT. Yes.

Mr. PEARSE. I do not understand that an exception is necessary.

Exception."

4. The court erred in the admission of evidence offered by the plaintiff, full substance of which is as follows:

"By the COURT:

Q. Is that a trade journal?

A. Yes; all three of those are trade journals.

Mr. PEARSE. If your honor please, I must object to this witness testifying with reference to these various magazines. It seems to me that the magazines themselves are the best evidence. There may be some very damaging statements in the magazines as to the plaintiff's case and as to what the condition of the market was and the circumstances of the market.

The COURT. I know, but he may be proving that something like a stock journal; if so, I take it it is admissible.

Mr. WILLIAMS. It has been so ruled, sir; the Supreme Court of Maryland has distinctly ruled on the question. You can have a trade paper which is recognized as an authority.

Exception."

235 5. The court erred in refusing to permit the cross-examination by the defendant of the witness for the plaintiff, as follows:

"By Mr. PEARSE:

Q. That is, that while the price for domestic was lower than the export price it was a price which yielded the coal company a profit?

Mr. WILLIAMS. I object to that. I do not think the question is proper.

The COURT. I do not see how the question is proper, Mr. Pearse.

Mr. PEARSE. Well, perhaps I was unskillful in framing my question.

The COURT. I understood you were trying to find out whether there was a factor of fifty cents in the variance between the domestic and import coal.

Mr. PEARSE. In an ordinary market?

The COURT. Now, as a coal man, would you say that there was that factor of fifty cents difference between export and domestic in use in the coal market; did you ever hear of it?

The WITNESS. Judge, it varies very materially.

Mr. PEARSE:

Q. Between fifty cents and a dollar?

A. It might be up to \$1.50. For instance, the United States Fuel Administrator acknowledged \$1.50 difference between inland and export in his price of \$4.53. He acknowledges \$1.50

By the COURT:

Q. Then there is no definite factor of variation?

A. No, sir.

Q. Either fifty cents or \$1.50 or \$1.00; it varies as circumstances arise?

A. As conditions arise.

236

By Mr. PEARSE:

Q. All right. Then what in your experience in ordinary times would be the limit of variation between export and domestic trade?

A. What do you mean by——

Mr. WILLIAMS. Are we interested in ordinary times or ideal times?

Mr. PEARSE. Do you object to the question?

Mr. WILLIAMS. I object.

The COURT. Objection sustained.

Exception."

6. The court erred in refusing to permit the cross-examination by the defendant of the witness for the plaintiff, as follows:

"By Mr. PEARSE:

Q. Then if Colonel Wentz should have said that he heard of it being offered as high as \$16 or \$17 a ton f. o. b. tidewater, isolated cases, and that that was not the average market price, he would be mistaken, would he?

Mr. WILLIAMS. I object to that. It seems to me, if the court please, that this way of getting in Colonel Wentz's alleged testimony is not proper cross-examination.

Mr. PEARSE. Do not say alleged testimony.

Mr. WILLIAMS. I do not know anything about it.

Mr. PEARSE. You ought to know.

The COURT. I don't know, but it seems to me that unless Colonel Wentz is a witness here that the statements of Colonel Wentz are of no greater probative force than the statement of anybody that might be made out on the curb.

Mr. PEARSE. My answer to that, sir, is this: That by the
237 witness himself, of course, by my question it appears who Colonel Wentz is; that he is a coal man and that necessarily by reason of his position he must know something about the price of coal, and Mr. Carpenter has come here and testified, and he has expert knowledge—I assume that he will agree with me that Colonel Wentz has some expert knowledge—and if he said something different from what Mr. Carpenter is saying it is perfectly legitimate cross-examination.

Mr. WILLIAMS. I object, if the court please, to this method of attempting to get before the jury the testimony which he could not offer to the jury. It is clearly improper. If Colonel Wentz is called here we have an opportunity to cross-examine him, to see what he knows about it.

The COURT. Objection sustained.

Exception."

7. The court erred in refusing to permit the cross-examination by the defendant of the witness for the plaintiff as follows:

"Cross-examination by Mr. PEARSE:

Q. Well, in the coal business in which you say you have been engaged for a period of twelve years, have you ever known of a period when prices of coal changed so rapidly within the same period of time?

Mr. WILLIAMS. I object to that as entirely irrelevant. We may have a very active market on the stock market, but if you fail to deliver the stock on that day you have to pay on that basis. You may have a very active market somewhere else, but if you fail to deliver on that day you have to pay that market.

238 Mr. PEARSE. It is your contention then that a market of that kind is a fair market?

Mr. WILLIAMS. The only possible measure of damages as between citizens or as between a Government and the citizens as to what a thing is worth is what you can get for it for gold dollars during that time.

The COURT. The objection is well taken; I will allow an exception.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Signed.)"

8. The court erred in the admission of evidence offered by the plaintiff, full substance of which is as follows:

"By Mr. WILLIAMS:

Q. Just give us those sales, Mr. Moon.

Mr. PEARSE. If your honor please, I object to that question. What particular difference does it make whether it is the Shipping Board or somebody else? Why should this be picked out as the criterion, this particular transaction?

Mr. WILLIAMS. It has a bearing on the prices.

Mr. PEARSE. To show it is a general market.

Mr. WILLIAMS. The best evidence of a market is the actual sales, especially actual sales to the Government, when you are contending here that they are not market prices; it is one Government indivisible—

The COURT. Let us have it.

Mr. PEARSE. Exception.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Signed.)"

239 9. The court erred in admitting evidence, Exhibits 1 and 2 on the part of the plaintiff as follows:

"By Mr. PEARSE:

Q. And the word 'fair' then does not enter into your description of the market?

A. Well, I would consider what two people agree upon as a fair price.

Q. No matter whether one was compelled to do it and the other one was able to furnish him with the object—

Mr. WILLIAMS. I object to that word compel.

A. I do not want to pass as a moralist, but if you want to put me on record I will say that at times I thought the prices were too high. We are suffering today from high prices. I was paying \$125 for a suit of clothes that I did not want to pay, that I had to pay.

Q. You had to have clothes?

A. Yes; I paid \$125 for a suit of clothes in New York and I went to London and bought this suit that I have on for \$47, which I regard as a better suit.

The COURT. Now, gentlemen, I think, with all due respect to the Government of the United States, that the fallacy of the position taken is illustrated by the examination of this witness.

Mr. WILLIAMS. I offer in evidence the exhibits and the graph.

The COURT. How about the magazines themselves from which your excerpts were taken.

Mr. WILLIAMS. The magazines are here, sir; my friend is on record as saying he has no objection to these figures from the magazines. When we were using the exhibits Mr. Pearse said that he had no objection to those figures.

240 Mr. PEARSE. I think those two exhibits were offered for identification. If your honor please, I wanted to object to the admission of those exhibits.

The COURT. I will hear you on their admission, Mr. Pearse, and I will deny your motion. The testimony shows that they were compiled by a witness who was on the stand, that they represented a tabulation of actual sales, excerpts of magazines, and other circumstances which were entirely within his control.

As to the actual sales, the sales were O. K'd by him before being made, and the prices were noted by him, and the first exhibit was simply a codification of the actual sales slips made by the witness, and O. K'd by him, which were here in court. Now, Exhibit 2 is a codification of the sales reports appearing on Exhibit 1, plus excerpts from the trade journals, the Black Diamond, Seward's Journal, and the Coal Trade Journal. And the trade papers themselves were here in court, and the excerpts and codifications on Exhibit 2 refer to the exact page of those respective journals wherein the information was taken from. It seems to me the exhibits are competent.

Mr. PEARSE. The only purpose of my objection is simply to have it on the record on the particular point I wanted to have on record, which is that Exhibit 1, and I think also Exhibit 2

purport to be sales known as spot sales for export trade and object to the use of such a paper for the reason that it would not seem that prices which were obtained for spot export sales are the proper prices upon which to base just compensation which the plaintiff may be entitled.

241 The COURT. I will allow you an exception.
The graph was marked Plaintiff's Exhibit 3.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly."

10. The court erred in sustaining an objection to a question of direct examination of one of the witnesses for the defendant, as follows:

"Direct examination by Mr. PEARSE:

Q. As a result of the advertising for bids, were any bids received?

A. Yes; there were twelve.

Q. And for what quantity of coal?

Mr. WILLIAMS. If the court please, I object. A bid cannot possibly fix market price. A market price is fixed by actual transactions and that is the only issue here.

(Discussion off the record between court and counsel.)

The COURT. I sustain Mr. Williams' objection and strike the entire line of testimony as irrelevant and incompetent. The question as to the compensation for coal commandeered is allowed an exception.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Sealed.)

11. The court erred in sustaining an objection to a question of direct examination of one of the witnesses for the defendant, as follows:

"Direct examination by Mr. PEARSE:

Q. How was the coal in question commandeered?

Mr. WILLIAMS. I object to that.

Q. What methods were used as to quantity, as to time, as to place?

242 Mr. WILLIAMS. I object to that.

The COURT. Objection sustained for the reason that the pleadings state the manner of the taking of the coal, and exception allowed.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Sealed.)

12. The court erred in sustaining an objection to a question of direct examination of one of the witnesses for the defendant, as follows:

"Direct examination by Mr. PEARSE:

Q. How much notice was given to the plaintiff in this case from time to time that it would be required to furnish coal for the Navy?

Mr. WILLIAMS. I object to that.

The COURT. Sustained. (Exception.)"

13. The court erred in sustaining an objection to a question on direct examination of one of the witnesses for the defendant, as follows:

"Direct examination by Mr. PEARSE:

Q. Can you tell us whether or not, in your position in the bureau, you have made a study of the coal situation during the years 1919 and 1920 and the early part of 1921 with respect to the supply of coal, the demand for it, and the prices which obtained?

A. I have.

Q. As a result of that study and as a result of the advertising for bids by the Navy, was it possible for the Navy to secure coal under contract?

Mr. WILLIAMS. I object to that.

The COURT. Objection sustained.

Exception."

14. The court erred in admitting into evidence testimony and documentary on the part of the plaintiff, as follows:

"Direct examination by Mr. PEARSE:

Q. In your investigation of the situation with respect to coal what did you do?

Mr. WILLIAMS. I wonder if we might not have an offer of proof to save time, if the court please, if that is compatible with your practice. I ask for an offer of proof.

Mr. PEARSE. I don't know whether that will make my record good or not.

The COURT. I assume if I exclude your offer and allow you an exception it is as good a record as is obtainable on a point of this kind.

Mr. PEARSE. All right, sir. I desire to offer by this witness proof that the Navy advertised for bids for coal with a result that sufficient bids were not received to supply coal in sufficient quantities for the use of the Navy.

Mr. WILLIAMS. I do not want to break in, Mr. Pearse, but is it necessary to repeat what has been ruled out?

Mr. PEARSE. I am stating my offer. That as a result the Navy requisitioned, under the authority of Congress, a supply of coal for the years 1919, 1920, and 1921. That they fixed the price which they considered to be just compensation using as bases for arriving at the figures reports of the Federal Trade Commission, based upon reports furnished to the Federal Trades

Commission by the coal operators in this New River district as to the cost of producing coal and a reasonable margin of profit thereon including all overhead and everything else in connection with the production of coal.

244 They also based their figures as a result of conferences with coal operators themselves who advised the Navy as to what would be a just price and a reasonable price for the Navy to pay for coal. Some of the operators, and quite a large number of them, preferred that the coal should be requisitioned rather than that the Navy should contract for it for reasons of their own. That they based those prices also on figures supplied by the Fuel Administration. That they did not consider that what is known as spot export prices should in any way govern the prices which should be paid to the coal operator for his coal but rather that as the coal was to be taken in small quantities each month, distributed among 67 companies operating in the district that it was fair to fix a price which would be consistent with the fair contract price for coal.

I desire to show further by this witness that coal was supplied to the Panama Railroad Company and to other companies I believe, at a price which compared with the prices which the Navy allowed the plaintiff in this case. I also desire to show by this witness that while it is true that on particular dates, as set forth in the schedule attached to the complaint in this case they were the days upon which the coal was actually delivered by the plaintiff to the Navy; that previous notice was given both by the requisition orders and by other notices which were sent out, so that ample time might be afforded the plaintiff in this case as well as the other co-operators as to what the necessities of the Navy were at once, so as not to deplete the pool at Hampton Roads.

Mr. WILLIAMS. And I object to that in toto.

Mr. PEARSE. I also want to prove by this witness that 245 is customary in the coal trade to make contracts for coal in the month of April of each year to cover a period of either months or a year, and that there is a vast difference in the price which is paid for contract coal from the price paid for purely speculative coal such as has been testified to by the witnesses for the plaintiff. That the market at Hampton Roads was a purely speculative market and did not in any way represent the reasonable value of the article itself. Also that there is a distinction in the price between what is known as export coal spot and domestic coal spot, the price of coal for domestic use being much less than the prices that were obtained at Hampton Roads during this period for spot export coal.

I also desire to prove by this witness that Mr. Carpenter, the vice-president of the company, furnished to the Navy through a letter written by him on February 19, 1919, figures to show what it cost his company to produce the coal, showing the

the average cost of production during the year of 1918 was \$2.79, and from those figures to show by this witness how the Government arrived at additional sums which increased the amount which the Government thought was just compensation to be paid for the coal.

Also I wish to show by this witness and to offer in evidence letters written by this company in which they express a desire to be compensated for the coal which they took on the basis of cost plus, which is familiar to all of us.

THE COURT. Now, there, are you going into the question of a waiver of its rights under the commandeering statutes?

MR. PEARSE. I had not intended to offer it for that purpose.

246 MR. WILLIAMS. Of course, we would have resisted this, but it seems to me that is out of line. If you have any such letters I think you ought to produce the letters.

MR. PEARSE. You do not mean to suggest that I was going to produce anything that I did not have?

THE COURT. It occurs to me that letters purporting to show a willingness to take compensation arrived at by the Government would create a different legal aspect from any that we have had so far. So I think that your offer as to what ought to be couched in possibly a different form—that the letters themselves ought to be offered—and I will rule on those later on.

MR. PEARSE. I will do that later. I also desire to prove by this witness that out of 52 coal operators whose coal was requisitioned all but ten have expressed their satisfaction with the prices set by the Navy, five have objected, and the other five have not been heard from. I would like to change that. Perhaps Commander Cobey had better state that. May he do that as though I were making the offer?

THE COURT. Just let the stenographer have the figures of those who accepted and those who rejected it.

THE WITNESS. There were 42 accepted and five objected and five have not been heard from.

THE COURT. That is just as you stated it.

MR. PEARSE. And out of those five who rejected it one is the plaintiff in this suit, who, with two others, have brought suit.

I also desire to show by this witness that there is such a variation in the price of coal that even in one of the suits which
247 was brought by one of these five objecting companies, an allowance of \$5.50 was made by the court.

THE COURT. Court or jury?

MR. PEARSE. Court, no jury, the court sitting as a jury.

THE COURT. Upon that offer I sustain the objection which Mr. Williams makes for the reason that it is incompetent in a suit brought for the recovery of damages for commandeering of coal taken. The offer to prove any of the facts and circumstances referred to in the offer as to the letters which you re-

ferred to, I will have to see those and see whether they might constitute a waiver of the right to demand just compensation that would be fixed by a jury for the property taken.

Mr. PEARSE. There are two of them right together.

Mr. WILLIAMS. I object to them.

The COURT. I will exclude the letter of May 26, 1920, purported to be written by John E. McGowan to the Navy Department, Bureau of Supplies, for the reason that the same does not amount to a waiver of any legal rights which the plaintiff company might have. And the same with respect to the letter of November 4th, the letters being merely a willingness to compromise before this dispute actually arose.

Mr. PEARSE. If the court please, that is all I can think of now. I have two or three witnesses here who will probably suffer the same fate, who come from Washington.

The COURT. You can state your other offers to-morrow morning. Suppose you swear those witnesses.

248 DAVID L. WING, called as a witness on behalf of the Government being duly sworn testifies as follows:

Direct examination by Mr. PEARSE:

Q. What is your business?

A. Statistician and economist, Washington, D. C.

(Witness withdrawn.)

Mr. PEARSE. If the court please, may I finish the offer which I was making yesterday with respect to some of the witnesses that returned to Washington?

The COURT. Yes.

Mr. PEARSE. I make a mistake in describing Mr. Napier as occupying the same official position as Mr. Durand. In all other respects his testimony will be the same, but his position is actually chief accountant of the Federal Trade Commission.

Then Mr. Wing was sworn and I offered to prove by him in the first place that he is an expert on the cost of mining and producing coal including export coal on prices other than present market prices, and we offer him for the purpose of proving that it cost to produce this coal together with what would be a reasonable profit to be made thereon, and that through his connection with the other departments of the Government who are engaged in this work, he was in conference with the Shipping Board, the Navy and the Bureau of Supplies and Accounts concerning the prices fixed by the Navy for the coal of the plaintiff which was taken. I understand that your honor overruled that?

The COURT. Yes.

Mr. PEARSE. Exception.

249 Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Signed.)

15. The court erred in refusing to admit in evidence certain letters written by the plaintiff to the representatives of the defendant:

"By Mr. PEARSE:

Q. Commander Cobey, have you here with you all the letters or copies of letters passing between the Navy Department and the plaintiff in this case with reference to the coal in question?

A. We have.

Mr. PEARSE. I offer those letters in evidence.

Mr. WILLIAMS. I think they should be considered one by one, if the court please.

Mr. PEARSE. All right.

The COURT. Mr. Pearse, what is the legal effect claimed for the letters?

Mr. PEARSE. They show the circumstances under which the Navy took the coal, the correspondence containing the prices to be paid for the coal and the amount of the coal which was taken, the distribution of the taking of the coal over different periods so as to be fair to the plaintiff, and the quantity taken from that particular company.

The COURT. Do they anywhere show an acceptance by the plaintiff company of the proposition of the Navy?

Mr. PEARSE. Frankly, I believe I must answer that question in the negative, except in so far as it may be inferred from the two letters which were rejected yesterday as being the opinion of the plaintiff of the prices which it should be paid for the coal. Your honor will recall the contents of those letters.

250 The COURT. Yes; but those letters which I read, those two letters, indicated to my mind that there had been negotiations with respect to coal; that there had been no agreement with respect to coal, and that the plaintiff terminated the negotiations; therefore the Navy's right not resting in contract must rest under the statute. Now, if they rest under the statute it becomes a question for a court and jury as to what is just compensation, and upon that question, what some official of the Government may say has no bearing where the commodity is dealt in on the open market.

Now, there is no proof to show that there was not a market for this kind and quality of coal at Hampton Roads at the time; that fact is uncontroverted. Therefore, there is but a single question and that is, What is the market price?

Mr. PEARSE. The fair market price.

The COURT. What is the market price? You are not dealing now in real estate. You are dealing in a commodity, personal property. What is its market price?

Now, if the letters tend to show that there was a contract, then the Navy ought not to stand on the commandeering but ought to defend the action on the theory that there was an agreement with respect to the taking of the coal.

Mr. PEARSE. As I have already stated, we cannot go that far. I cannot state that the contents of those letters will reveal any such situation.

The COURT. Now, has the Government any proof that there was not a market?

Mr. PEARSE. That is what I am going to ask Commander Cobey, qualify him as an expert, and bring that out to the best of my ability.

251 Mr. WILLIAMS. There was an offer of letters, if the court please; I object to them.

The COURT. Your objection to the offer of the letters is sustained, and counsel for the Government has an exception.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

Exhibits 1 and 2."

16. The court erred in refusing to admit in evidence records of the departments of the Government as follows, being the exhibits attached to the record in the case, namely, Exhibits "G. 1 to G. 34 inclusive," as follows:

"By Mr. PEARSE:

Q. What do those reports and other data consist of?

A. They consist of reports received; they are reports of conferences held with suppliers of coal from this field where the plaintiff's coal came; they are reports from the United States Senate Committee on Reproduction and Construction that held various Senate hearings on coal; they are reports from the Senate Committee on Manufactures that held hearings on coal for several months; reports from the Interstate Commerce Commission and other governmental departments; also other operators of what they considered the price to be for coal.

Q. And that information is all contained in the records which I have just referred to?

A. Yes; certified copies, certified by the Secretary of the Navy.

Mr. PEARSE. I offer all those records in evidence.

Mr. WILLIAMS. I object to them.

The COURT. Objection sustained.

252 Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Signed.)

17. The court erred in sustaining an objection to a question of direct examination of one of the witnesses for the defendant. as follows:

"By Mr. PEARSE:

Q. In the coal trade does the sale of a small quantity of coal or the sale of small quantities of coal such as the spot sales which have been described as being by the other witnesses,

they sufficient to create what would be considered in the trade as a market upon which the price of coal could be based?

Mr. WILLIAMS. I object to that.

The COURT. Objection sustained and I will allow an exception.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Signed.)"

18. The court erred in sustaining an objection to a question on direct examination of one of the witnesses for the defendant, as follows:

"By Mr. PEARSE:

Q. Is the market price of coal regulated and fixed in the same manner as would be fixed the market price of shares of stock where one or a few quotations were made?

Mr. WILLIAMS. I object to that.

The COURT. Objection sustained.

Q. What is the coal market?

Mr. WILLIAMS. That question I object to, if the court please. We have had the facts from the witness that there was a market.

253 Mr. PEARSE. Oh, do not keep rubbing that in. He says he admist coal was bought and sold; he has not said there was a market; he says there was not a market.

The COURT. Now, gentlemen, the objection is sustained.

Mr. PEARSE. Do I understand that your honor will not let him define what a market is for coal?

The COURT. I think that we have had a great deal of testimony to the effect that there was a market; the witness has said that there was a coal market, so that I do not see that it is necessary to have it defined.

By Mr. PEARSE:

Q. Do I understand from the answers which you have made to any questions which have been asked you that it is your opinion that there was a market for coal during this period upon which the price of coal could be fixed?

Mr. WILLIAMS. I object to that.

The COURT. I think we are traveling right back again to where we started from.

Q. If you said that there was a market for coal in answer to any question, what did you mean?

Mr. WILLIAMS. I object to that.

The COURT. Objection sustained."

19. The court erred in sustaining an objection to a question on direct examination of one of the witnesses for the defendant as follows:

"By Mr. PEARSE:

Q. The witnesses for the plaintiff have testified after giving certain figures as shown by the exhibits that in their opinion there was a fair market and fair market price for coal during the periods in question. From your experience and familiarity with the coal situation, is that so?

Mr. WILLIAMS. I object to that.

The COURT. Objection sustained. Exception.

Mr. PEARSE. If your honor please, I do not want to keep arguing, but why should he be not allowed to express an opinion as well as these other fellows?

The COURT. I take it, Mr. Pearse, that the question here is was there a market? They have all said there was a market. The next question is, what was the market price? As to the market price, the plaintiff's witnesses vary as between themselves. Now, if you can show by this witness or any other witness that the market price was different from what has been testified to as to the market price, there are variations as between the plaintiff's own witnesses, so that the jury will have to solve that problem, then I would allow this witness to testify as to the incorrectness of the market price as testified to, and testify as to his best judgment as to what the market price was.

Mr. WILLIAMS. After he has qualified himself fully as an expert.

The COURT. As an expert on the market.

By Mr. PEARSE:

Q. During the period in question, while there may have been isolated sales of coal, was there any recognized author or source to which the Navy could go in order to ascertain what the price of coal was?

Mr. WILLIAMS. I object.

The COURT. Objection sustained.

Exception."

255 20. The court erred in sustaining an objection to a question on direct examination of one of the witnesses for the defendant as follows:

"By the COURT:

Q. In that they do not represent what the petition calls for a fair market value.

The COURT. You better strike all of this evidence out, every bit of it, it is entirely irrelevant and incompetent.

Mr. PEARSE. Your honor will allow me an exception to that.

The COURT. Surely.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Signed.)"

21. The court erred in sustaining an objection to a question on direct examination of one of the witnesses for the defendant as follows:

"By Mr. PEARSE:

Q. I do not think I have asked this question. In your opinion, was there a free market for the sale of coal from September 19 to January 21, 1921, for the grade of coal involved in this suit?

Mr. WILLIAMS. I object to that.

The COURT. Objection sustained."

22. The court erred in sustaining an objection to a question on direct examination of one of the witnesses for the defendant, as follows:

"By Mr. PEARSE:

Q. Take that schedule. What was the price fixed for the sale of coal by the Navy in September, 1919?

Mr. WILLIAMS. If the court please, I was about to say, 256 the plaintiff admits that he had received from the defendant the sum of \$97,354.56 since the bringing of this suit, being the amount allowed by the Navy in accordance with its notion of its duty under the law.

Mr. PEARSE. Does your honor overrule my question?

The COURT. Yes; I do.

Exception."

23. The court erred in not charging the jury as requested by the defendant, as follows:

(1) The market price at which coal was sold by the plaintiff for export at "spot" prices, that is, for prices which contemplated immediate delivery without any previous order or contract upon which the time and place of delivery were based and the price to be paid, is not alone the basis upon which just compensation shall be determined.

24. The court erred in not charging the jury as requested by the defendant, as follows:

(2) The price which the plaintiff could get for its coal at tidewater for export uses, and for shipping going to foreign ports at or about the same time or place when and where the coal was taken by the defendant, is not binding upon the jury in determining the value of the coal taken, although it may be evidence which may be considered in arriving at what the jury believes from all of the evidence in the case to be just compensation for the coal taken.

25. The court erred in not charging the jury as requested by the defendant, as follows:

(3) The market price of an article is only a means of arriving at compensation. It is not in itself the value of the article, but is evidence of value upon which just compensation may

257 be based or determined. The law adopts fair market price as a natural inference of fact, but not as a conclusive legal presumption.

26. The court erred in not charging the jury as requested by the defendant, as follows:

(4) The Constitution protects persons with respect to the taking of private property for public use, and guarantees that for all property taken for public uses just compensation shall be paid. This compensation, however, must be just not only to the persons whose property is taken but also to the public which is to pay for it.

27. The court erred in not charging the jury as requested by the defendant, as follows:

(5) Just compensation means full and fair equivalent for the loss sustained for the taking for public uses, the exercise of the power of taking public property for public use being necessary for the public good, and all property being held subject to the exercise of this power when and as the public good requires it. It would be unjust to the public that it should be required to pay the owner more than a fair indemnity for the loss he sustains by the appropriation of his property for the general public good.

28. The court erred in not charging the jury as requested by the defendant, as follows:

(6) To arrive at what is just compensation, the interest of the public and of the owner of the property and of all the circumstances of the particular appropriation should be taken into consideration, and in determining what is just compensation, the price for which the property might be sold for a particular purpose is not conclusive evidence.

258 29. The court erred in not charging the jury as requested by the defendant, as follows:

(7) In determining what is just compensation, the jury may consider not only the price which the coal would bring for export trade at "spot" but also the prices fixed by the Navy and the manner in which and the sources from which its information was obtained in fixing these prices; for example, the cost of production plus a reasonable profit, bearing in mind that the price should be not only just to the supplier but also just to the Government.

30. The court erred in not charging the jury as requested by the defendant, as follows:

(8) In determining what is just compensation the jury may consider the price which the coal would bring on the basis of contracts for the sale of coal covering definite periods of time, also the prices at which coal could be sold for "spot" for domestic use.

31. The court erred in not charging the jury as requested by the defendant, as follows:

(9) In determining what is just compensation the jury may consider any evidence which may be produced to show that the prices obtained by plaintiff for coal, other than the coal taken at the same time and place, were affected by restrictions upon the quantity which might be sold, and any other evidence which may be produced to show that the market was not free and unrestricted.

32. The court erred in not charging the jury as requested by the defendant, as follows:

(10) In determining the amount of damages to be awarded the plaintiff is not entitled to interest, as interest is only awarded against the Government of the United States where the Government has expressly contracted to pay interest, or where
259 the particular statute under which suit is brought authorizes the recovery of interest.

33. The court erred in not charging the jury as requested by the defendant, as follows:

(11) The burden of proof is upon the plaintiff to show that the compensation fixed by the President in accordance with the provisions of the law governing the requisitions of this kind is not just compensation.

34. The court erred in not charging the jury as requested by the defendant, as follows:

(12) In taking into consideration the evidence as to prices at which the coal was sold by the plaintiff and others, the plaintiff must show that the prices obtained were such as would obtain in a free, open, and unrestricted market, and that the buyers did not pay the price asked by the sellers of coal, through force of circumstances over which they had no control.

35. The court erred in not charging the jury as requested by the defendant, as follows:

(13) The Government of the United States is not to be penalized for the taking of the coal of the plaintiff and is not required to pay other than a reasonable price for the coal taken; that is, a price which will be fair to the public who pay for the coal and which will reasonably compensate the plaintiff whose coal has been taken.

36. The court erred in not charging the jury as requested by the defendant, as follows:

(14) The price to be paid for the coal taken is not the highest price which the plaintiff could obtain under any circumstances and for all available uses and purposes for which the coal might be used.

260 37. The court erred in not charging the jury as requested by the defendant, as follows:

(15) While the price which the plaintiff might obtain for its coal in a market may be evidence upon which to base just com-

pensation, the plaintiff must first show that there was free competition in the market under normal circumstances, with a seller not forced to sell and a buyer not compelled to buy.

In the absence of this proof, the price obtained is not a standard upon which just compensation may be based, as the price which was taken by the Government from the plaintiff was necessary for the maintenance of the Navy of the United States. The measure of just compensation which the Government may pay the plaintiff should not be based upon exorbitant prices resulting from a shortage due to the Government restrictions placed upon the market for the protection of its citizens, thereby affecting the stable condition of the market and preventing free and open market conditions.

38. The court erred in not charging the jury as requested by the defendant, as follows:

(16) In determining the question as to whether or not there existed a fair market during the period in question, the jury may consider the range of the alleged market price, namely, prices varying from \$5.00 to \$16.00, as set forth in the bill of complaint.

Government's counsel prays an exception to the refusal to charge above requests, which exception is hereby allowed and sealed accordingly.

(Signed.)

261 39. The court erred in its entire charge to the jury and all of which an exception was taken by the defendant, as follows:

The COURT. I will allow an exception to the Government's charge to each and every part and parcel of my charge.

Mr. PEARSE. I do not object to the whole of it, sir. There is only one or two points that I would like to mention unless you think that covers the situation.

The COURT. Yes; you may have an exception to everything.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Signed.)

(Endorsed:) United States District Court, District of New Jersey—The New River Collieries Company, plaintiff, vs. United States of America, defendant—Assignments of error—(Three cases consolidated)—Elmer H. Geran, United States attorney. Filed March 25, 1921, at 11 o'clock a. m. George T. Cranmer, clerk.

262 District Court of the United States, District of New Jersey.

THE NEW RIVER COLLIERIES COMPANY,
 plaintiff,
vs.
 UNITED STATES OF AMERICA.

At law. (Three cases consolidated.) Nos. 2756-2836-2926.

Petition for writ of error.

Filed May 25, 1921.

To the honorable judges of the United States District Court for the District of New Jersey:

And now comes United States of America, defendant in the above-entitled cause, by Elmer H. Geran, United States attorney, and Frederic M. P. Pearse, assistant United States attorney, and says that on the fifteenth day of April, 1921, the court entered judgment herein against the defendant on the verdict of the jury for the sum of two hundred thirteen thousand one hundred dollars and eleven cents (\$213,100.11) in the first case; nineteen thousand seven hundred dollars and ninety-one cents (\$19,700.91) in the second case; nine thousand, two hundred seventy-nine dollars and twenty-seven cents (\$9,270.27) in the third case, in which final judgments and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more fully appear in the assignment of errors which is filed with this petition.

Wherefore this defendant prays that a writ of error may issue in this behalf to the United States Circuit Court of Appeals for
 263 the Third Circuit for the correction of the errors so complained of and that a transcript of the record of the proceedings and papers in this cause duly authenticated may be sent to the said court.

ELMER H. GERAN,

U. S. Attorney,

FREDERIC M. P. PEARSE,

Ass't U. S. Attorney,

Attorneys for Defendant (Plaintiff in Error).

Dated May 25th, 1921.

(Endorsed:) United States District Court, District of New Jersey—New River Collieries Company, plaintiff (defendant in error) vs. United States of America, defendant (plaintiff in error)—At law—petition—(three cases consolidated)—Elmer H. Geran, United States attorney, Trenton, N. J. Filed May 25, 1921, at 11 o'clock a. m. George T. Cranmer, clerk.

264 District Court of the United States, District of New Jersey.

<p>THE NEW RIVER COLLIERIES COMPANY, plaintiff (defendant in error), <i>vs.</i> UNITED STATES OF AMERICA, DEFENDANT (plaintiff in error).</p>	}	<p>Nos. 2756-2836-2926. At law. (Three cases con- solidated.)</p>
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Order allowing writ of error.

Filed May 25, 1921.

This twenty-fifth day of May, 1921, came the defendant, United States of America, by Elmer H. Geran, United States attorney, and Frederic M. P. Pearse, assistant United States attorney, and filed herein and presented to the court its petition praying for the allowance of a writ of error intended to be urged by it; praying also that a transcript of record and proceedings and papers, upon which the judgments herein were rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Third Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court has allowed the writ of error.
J. L. BODINE, Judge.

265 (Endorsed:) United States District Court, District of New Jersey—The New River Collieries Company, plaintiff (defendant in error) vs. United States of America, defendant (plaintiff in error)—At law, order allowing writ of error (three cases consolidated)—Elmer H. Geran, United States attorney, Trenton, N. J. Filed May 25, 1921, at 11 o'clock a. m. George T. Cranmer, clerk.

266 *Writ of error.*

Filed May 25, 1921.

District Court of the United States, District of New Jersey.

UNITED STATES OF AMERICA, *ss.:*

Nos. 2756-2836-2926.

The President of the United States to the honorable judges of the District Court of the United States, for the District of New Jersey,
 GREETINGS.

Because, in the record and proceedings and also in the rendition of the judgment of a plea which is in the said district court before you, or some of you, between New Rivers Collieries Company, plaintiff, and United States of America, defendant, manifest error hath happened, to the great damage of the said United States of

America, plaintiff in error, as appears by its complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf.

Do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, together with this writ, to the United States Circuit Court of Appeals, in the Third Circuit, so that you have the same as the city of Philadelphia in the State of Pennsylvania in the United States court house and post-office building, in said city, on the fourth day of October, 1921, in the United States Circuit Court of Appeals for the Third Circuit, to be then and there held, that the record and proceedings aforesaid being inspected, said United States Circuit Court of Appeals for the Third Circuit may cause further to be done thereon to
 267 correct the error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Joseph McKenna, Chief Justice of the United States, this 25th day of May, in the year of our Lord one thousand nine hundred and twenty-one, and of the independence of the United States, the one hundred and forty-fourth.

GEORGE T. CRANMER, *Clerk*.

By R. S. CHEVRIER, *Deputy*.

I allow this writ.

[SEAL.]

J. L. BODINE, *Judge*.

(Endorsed:) United States District Court, District of New Jersey—New River Collieries Company, plaintiff (defendant in error), vs. United States of America, defendant (plaintiff in error)—Writ of error—Filed May 25, 1921, at 11 o'clock a. m. George T. Cranmer, clerk.

268

Citation.

Filed June 7, 1921.

UNITED STATES OF AMERICA, ss.

Nos. 2756-2836-2926.

To New River Collieries Company.

GREETING: You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Third Circuit, to be holden at the city of Philadelphia, in the State of Pennsylvania, in the circuit above named, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the District Court of the United States for the District of New Jersey, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgments rendered against the said plaintiff in error, as in

said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand within the district of New Jersey, in the third circuit, this 25th day of May, in the year of our Lord one thousand nine hundred and twenty-one.

J. L. BODINE, Judge.

Service of the within citation is hereby acknowledged this 6th day of June, 1921.

WM. A. SMITH,

Attorney of New River Collieries Company.

(Endorsed:) United States District Court, District of New Jersey—United States of America, plaintiff in error, vs. New River Collieries Company, defendant in error—Citation—Filed Jun. 7, 1921, at 11 o'clock a. m.—George T. Cranmer, clerk.

269

Stipulation as to record.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said district court in the above-entitled matter, as agreed on by the parties.

United States Attorney for the District of New Jersey.

Attorney for Defendant, New River Collieries Company.

270 United States District Court, District of New Jersey.

UNITED STATES OF AMERICA, }
District of New Jersey, }^{ss.:}

I, George T. Cranmer, clerk of the District Court of the United States of America, for the District of New Jersey, do hereby certify that the foregoing is a true transcript of the record on writ of error in the three cases of United States, plaintiff-in-error, vs. The New River Collieries Company, defendant-in-error, Nos. 2756, 2836, and 2926.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court at Trenton, in said district, this 16th day of June, nineteen hundred and twenty-one.

[SEAL.]

GEORGE T. CRANMER,
Clerk, District Court, U. S.
By R. S. CHEVRIER, Deputy.

271

Citation.

UNITED STATES OF AMERICA, ss.:

Nos. 2756-2836-2926

To New River Collieries Company:

GREETING: You are hereby cited and admonished to be and appear before the United States Supreme Court, to be holden at the city of

Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the United States Circuit Court of Appeals, third circuit, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgments rendered against the said plaintiff in error affirming the judgments of the United States District Court for the District of New Jersey, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand within the third circuit of the United States, this first day of March, in the year of our Lord one thousand nine hundred and twenty-two.

J. WARREN DAVIS, *Judge.*

272-273 I hereby acknowledge, on behalf of the New River Collieries Company, defendant in error, service of the within citation, directing it to appear before the United States Supreme Court within thirty days from March 1st, 1922, the date of said citation.

IRA JEWELL WILLIAMS,
*Attorney for New River Collieries
Company, March 25th, 1922.*

(Endorsed:) Circuit Court of Appeals of the United States for the third circuit. The New River Collieries Company, plaintiff, defendant in error, vs. United States of America, defendant, plaintiff in error. (Three cases consolidated.) Citation.

274 United States Circuit Court of Appeals for the Third Circuit, October term, 1921.

No. 2736 (list No. 36). United States, plaintiff in error, vs. New River Collieries Co., defendant in error.

In error to the District Court of the United States for the District of New Jersey.

And now, to wit, this 14th day of October, A. D. 1921, it is ordered that Hon. J. Whitaker Thompson, district judge, for the Eastern District of Pennsylvania, be, and he is hereby, assigned to sit in above case in order to make full court.

VICTOR B. WOOLLEY,
Circuit Judge.

(Endorsements:) 2736. Order assigning Hon. J. Whitaker Thompson for argument. Received & filed Oct. 14, 1921. Saunders Lewis, jr., clerk.

275 In the United States Circuit Court of Appeals for the Third Circuit, October term, 1921.

No. 2736. United States, plaintiff in error, vs. New River Collieries Co., defendant in error.

And afterwards, to wit, on the fourteenth day of October, 1921, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Victor B. Woolley and Hon. J. Warren Davis, circuit judges, and Hon. J. Whitaker Thompson, district judge, and the court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the seventh day of December, 1921, come the parties aforesaid by their counsel aforesaid, and the court now being fully advised in the premises, renders the following decision:

276 In the United States Circuit Court of Appeals for the Third Circuit, October term, 1921.

No. 2736. New River Collieries Company, plaintiff (defendant in error), vs. United States of America, defendant (plaintiff in error).

In error to the District Court of the United States for the District of New Jersey. Before Woolley and Davis, circuit judges, and Thompson, district judge.

WOOLLEY, *Circuit Judge*.

This writ brings here for review a judgment of the district court entered upon the verdict of a jury in favor of the New River Collieries Company in several suits brought to recover from the United States just compensation for private property taken for a public use. The sole question is the measure of compensation.

The parties, in their conduct, followed strictly the provisions of the act of Congress commonly known as the Lever Act (approved August 10, 1917, 40 Stat. 276). The United States, through the Navy Department, requisitioned a large tonnage of coal belonging to the Collieries Company, at Hampton Roads, Virginia, at different times during a period commencing in September, 1919, and ending in February, 1921, and tendered payment at a price named by the Navy Department. The Collieries Company, being dissatisfied with the tender, declined it and brought these actions under the section of the act which gave the district courts of the United States jurisdiction to hear and determine claims for just compensation for property taken by the Government in the exercise of its power of requisition—section 10.

At the trial both parties offered evidence in support of what they respectively regarded as the true measure of compensation, fully realizing that in providing that compensation be made for private

property taken for public use the Congress intended compensation of a character that would conform with the "just compensation" prescribed, in like event, by the fifth amendment to the Constitution. *United States vs. Cohen Grocery Co.*, 225 U. S. 88.

The plaintiff introduced evidence which, not being disputed, proved that at the place and during the time the Government took the plaintiff's coal there were two markets for coal, a domestic
277 market and an export market, the latter being the higher; that both markets were affected by war conditions still prevailing and by Government restrictions still in force, though in both markets supply and demand were the controlling factors; that the business of the plaintiff was chiefly in the export trade; that the export demand during the time and at the place in question was such that, but for the action of the Government in requisitioning its coal, it could have sold its coal for export at prices prevailing for spot deliveries. On this evidence the plaintiff took the position that "just compensation" means the fair market price of the property at the time and place of the taking, if a market exists and a price is shown.

The United States advanced the proposition that just compensation is to be determined by the value of the property; that market price, while evidence of value, is not conclusive. *Johnson-Brinkman Commission Co. vs. Wabash R. R. Co.*, 64 Mo. App. 590, 595; *United States vs. Valiant*, 153 Fed. 520; therefore other evidence of value is admissible. The other evidence which the Government offered in proof of value was the cost of the coal to the plaintiff, reckoned on figures supplied by the Federal Trade Commission, plus what the Navy Department regarded as a reasonable profit; also the prices for contract coal in the domestic market which were lower than prices for spot coal for export. In addition the Government contended that both markets for coal at Hampton Roads during the period in question were, because of war conditions, purely speculative, and that prices there current in no way reflected the reasonable value of the coal itself. Ruling that the plaintiff was entitled to recover the fair market price for its coal according as the jury might determine its value from the evidence, which, not being controverted, showed an export market with going quotations, the court refused to admit the testimony offered by the Government. On the exception noted this writ was founded, raising squarely the question of the rule of just compensation in such case.

Reading into the Lever Act the words of the fifth amendment to the Constitution—"Nor shall private property be taken for public use without just compensation"—it is evident that the Congress intended that for property taken, whether real or personal, "the compensation must be a full and perfect equivalent." *Monongahela Navigation Co. vs. United States*, 141 U. S. 312;
278 *Kanakanui vs. United States*, 244 Fed. 923. Such an equivalent is not the value of the property to the Government for its particular use, but is its fair market value for all available uses. *United States vs. Chandler-Dunbar Co.*, 229 U. S. 53, 80; *Boone Co. vs.*

Patterson, 98 U. S. 403; United States vs. Bank, 250 Fed. 299. No one, we imagine, questions this rule. The difficulty, however, is in finding the fair market value, a difficulty which depends largely on the character of the property taken, whether realty or personality. If it be land, varied considerations enter, as shown by cases cited in the briefs, not here applicable. If it be a commodity, the task is less complex, yet fraught with more or less difficulty according as the commodity is or is not readily salable and as there is or is not a market where like commodities are openly traded in. If, further, the commodity be a staple, which, like coal, is produced for sale and consumption, not for retention and long use, the difficulty is again reduced, for in such instance the first—and sometimes the last—inquiry to be made in reckoning its value is its worth as an article of sale. If it be an article commonly traded in on a market and it is shown that at the time and place it was taken there was a market in which like articles in volume were openly bought and sold, the prices current in such a market will be regarded as its fair market value and likewise the measure of just compensation for its requisition.

But the Government contends that the coal market in question, being still under war influences and still restricted by Government regulations, was not a market from whose prices a fair market value of the commodity traded in could be validly determined, citing cases in which courts have held, quite properly, that market value is not to be determined by market prices brought about by some peculiar accidental circumstance, or some sudden or temporary turn in the trade, or influenced by some pressing necessity of seller or buyer, producing prices out of all proportion to the value of the articles and beyond what anyone else, not thus affected, was willing to pay. Johnson-Brinkman Commission Co. vs. Wabash R. R. Co., 64 Mo. App. 590; Lawrence vs. Boston, 119 Mass. 126, 128. While this is the law, we think it does not apply to this case. Admittedly, the coal

279 market at Hampton Roads was affected by war conditions and Government restrictions. The market there was abnormal in

the sense of being different from the market before the war. While war did produce a condition where the demand greatly exceeded the supply, it was not a condition prevailing on particular days at the particular place at which the Government requisitioned the plaintiff's coal, but was a general condition prevailing wherever coal was bought and sold. War did not destroy the coal market; it made a market of another kind, which, though abnormal in comparison with the peace market, was firmly established and long continued. The prices at which coal was regularly sold and bought in such a market under its vicissitudes constituted, we think, valid evidence of its fair market value. But there were at Hampton Roads two markets for coal, domestic and export. We are further of opinion that the plaintiff, in seeking evidence of the fair market price for coal to prove the fair market value of its coal, was entitled to avail itself of the price in that market in which, but for the action

of the Government, it could, and according to the habit of its business it probably would, have sold its coal. That was the price in the export market. It follows therefore that the Government's evidence of a value for the plaintiff's coal fixed by the Navy Department on a basis of cost plus a reasonable profit and of prices in the domestic market for contract coal, would not, if admitted, have reduced the valuation of the plaintiff's coal under the rule here found applicable and would not, in consequence, have served any evidential purpose. The court's rejection of the evidence, therefore, was not error.

The judgment below is affirmed.

(Endorsements :) 2736. Opinion of the court by Woolley, J. Received & filed Dec. 7, 1921. Saunders Lewis, jr., clerk.

280 In the United States Circuit Court of Appeals for the Third Circuit, October term, 1921.

No. 2736 (list No. 36). United States, plaintiff in error, vs. New River Collieries Co., defendant in error. In error to the District Court of the United States for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of New Jersey and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgments of the said district court in this cause be, and the same are hereby, affirmed.

Philadelphia, December 7, 1921.

VICTOR B. WOOLLEY,
Circuit Judge.

(Endorsements :) 2736. Order affirming judgment received & filed Dec. 7, 1921. Saunders Lewis, jr., clerk.

281 UNITED STATES OF AMERICA, ss.

The President of the United States of America. To the honorable the judges of the District Court of the United States for the District of New Jersey.

GREETING: Whereas lately in the District Court of the United States for the District of New Jersey, before you or some of you in a cause between United States of America (defendant below), plaintiff in error, and New River Collieries Co. (plaintiff below), defendant in error (District Court Nos. 2756, 2836, 2926), judgments were entered in the said district court on the fifteenth day of April, 1921, which judgments are of record in the office of the said district court, to which reference is hereby made, and the same are
282 hereby expressly made a part hereof, as and by the inspection of the transcript of the record of the said district court, which was brought into the United States Circuit Court of Appeals for the Third Circuit by virtue of a writ of error, agreeably to the act of Congress, in such case made and provided, more fully and at large appears.

283 And whereas in the present term of October, in the year of our Lord one thousand nine hundred and twenty-one, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

On consideration whereof it is now here ordered and adjudged by this court that the judgments of the said district court in this cause be, and the same are hereby, affirmed.

Philadelphia, December 7, 1921.

284 You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness, the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, at Philadelphia, the ninth day of January, in the year of our Lord one thousand nine hundred and twenty-two (1922).

SAUNDERS LEWIS, JR.,

Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

(Endorsed:) Original file No. 2736. U. S. Circuit Court of Appeals, Third Circuit. No. 36, October term, 1921. United States plaintiff in error, vs. New River Collieries Co., defendant in error. Copy of mandate. Received & filed Jan. 9, 1922. Saunders Lewis, jr., clerk.

285 Circuit Court of Appeals of the United States for the Third Circuit.

THE NEW RIVER COLLIERIES COMPANY,	} Assignments of error (Three cases consolidated.)
plaintiff-defendant in error,	
<i>vs.</i>	
UNITED STATES OF AMERICA, DEFENDANT-	}
plaintiff in error.	

Assignments of error of the defendant, the United States of America.

Comes now the said plaintiff in error and, in connection with its petition for a writ of error, respectfully submits that in the record decision and final judgment of this court in the above entitled cause there is manifest error in this, to wit:

(1) The court erred in upholding the action of the trial court in the admission of evidence offered by the plaintiff, full substance of which is as follows:

⁶⁶ By Mr. WILLIAMS:

Q. Direct your attention again, Mr. Carpenter, to the statement which you have prepared. Will you please explain to the court and jury just what your statement shows with regard to the figures?

Mr. PEARSE. If your honor please, I must object to using this statement, which on its face refers to spot sales. I still insist that spot sales are not the proper measure for just compensation where the coal is taken for domestic use, and, furthermore, until it is shown under what terms the Government took the coal and what were the forms of the requisitioning, how frequently the coal was required and in what quantities it was required, this witness is not in a position to testify as to any figures so far as the market value is concerned.

286 Mr. WILLIAMS. If the court please, the facts appear undisputed on the record as to how the coal was taken.

Mr. PEARSE. It was taken, that is all.

Mr. WILLIAMS. It shows the dates on which it was taken, and the dates on which they were taken were the dates which fixed the question as to the market price. At any rate, it certainly is some evidence of value to show what others were willing to pay and actually did pay for coal on the days in question.

The Court. The plaintiff alleges that by virtue of the authority conferred by the President of the United States, and so forth and so on—it seems to me that you come directly to the issue as to what was the just compensation for the coal, and I will receive at this time the evidence of this witness with respect to the market for spot coal, allowing the Government an exception.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Signed.)"

(2) The court erred in upholding the action of the trial court in the admission of evidence at the trial, offered by the plaintiff, full substance of which is as follows:

" Mr. WILLIAMS:

Q. Will you proceed, Mr. Carpenter, and explain this statement, just what it means?

A. Just what is your question, if you please?

Q. Explain the statement and what it means.

A. This statement shows opposite the date of each month headed the number of tons of coal sold spot and the price obtained therefor, f. o. b. cars mines. For instance, on September 2d we sold 2,157 tons of coal for \$5.50. On September 16th, 1,610 tons of coal for \$4.74.

Mr. PEARSE. It was not listening to the witness. I did not know that he was starting in to testify. If your honor please, I hope you will pardon me for objecting so often, but it seems to me that at this point, this gets right to the crux of the very case we are on. This witness is testifying with respect to certain prices that his company received for coal on certain

occasions and on certain dates. Now, I do not understand that that is a method by which a market is established. These
287 are isolated prices at which coal was sold by this particular company. Now, the contention of the other side is that just compensation, as I understand it, is to be based upon the fair market value of the goods taken. That fair market value is certainly not established by testimony of individual sales by the particular company in question.

The COURT. I think that is part of the proof. I do not think it is the whole proof. I do not imagine that Mr. Williams contends that it is the whole proof on the market price. But if you were going into the question of the market price of real estate you would call an expert in real estate; that is, a man who had bought and sold real estate on his own account and on the account of others, and then he would testify as to what price he believed to be a fair price for a certain piece of property which would be based upon the price that was obtained for some similarly situated property at or around the time that he was fixing the price. Now, this witness says, 'I am the sales officer of this company. I have kept track of the price that has been obtained by our company from the sale of coal spot during this period of time. I will tell you just what we got every time we sold during this entire period. I also keep track of what other people obtained.'

No; I presume that presently Mr. Williams will come to the price which others obtained and then he may follow that up with testimony from other persons similarly situated to show what they obtained, and then the jury from all the testimony would look into the question as to what the market was. It is only evidential; it is not the whole story.

Mr. PEARSE. Then may I reserve my right to strike out the testimony of this witness with respect to these individual sales if the plaintiff does not back it up by the testimony of other companies that have sold coal at these prices?

The COURT. Well, other testimony with respect to prices.

Mr. WILLIAMS. I would suppose, sir, that as in the case of the sale of real estate that this is merely a matter for expert
288 testimony. The witness is offered as an expert. He says he was familiar with other people's sales; he was familiar with the market, and he proposes to say what the fair market prices were on deliveries by way of the fairest possible terms to qualify him as a witness, to show that he himself had taken part in a number of sales. I believe that should be reserved for cross examination. I believe he would be entirely competent to say: 'Did you know the market, were you familiar with the market, did you have transactions during this period?' and if he said, 'Yes,' 'Are you able to give us the market prices?' for him then to say, 'In my opinion these were the fair market prices.'

Mr. PEARSE. I think my reservation was allowed.

The COURT. No; I took it that this was a step in the proof. I do not think that the court has any control over counsel as to the number of witnesses that he may call. It may be that counsel intends to rest on the testimony of this one witness, and if so that goes to the weight of the evidence but not as to its admissibility.

Mr. PEARSE. In order to keep the record clear, then I understand that your honor overrules any request to subsequently make a motion to strike out this testimony?

The COURT. I could not strike out testimony that is relevant.

Mr. PEARSE. I do not think it is relevant; that is my trouble. Exception."

(3) The court erred in upholding the action of the trial court in the admission of evidence offered by the plaintiff at the trial, full substance of which is as follows:

"By Mr. WILLIAMS:

Q. Are you able from your knowledge of the market and the sales made by you to say what were the fair market prices on this quality of coal on these various dates?

A. In my judgment——

Mr. PEARSE. I object to that question until we find what
289 market price they are talking about; whether it is spot market or contract market or the market for export trade or the market for domestic trade.

The COURT. Is not that, Mr. Pearse, really a matter for cross-examination?

Mr. PEARSE. Perhaps it is.

The COURT. It is a matter for the defense to lay its foundation by the cross-examination of this witness. Now, if this witness has not qualified as to his ability to testify as to the market, or if it develops that he is testifying as to a particular market or a market which is not applicable to the matter in suit, why then a different matter will develop.

Mr. PEARSE. The question is incomprehensive; that is what I am objecting to; that is the trouble with the whole situation in a nutshell.

Mr. WILLIAMS. We can take each price at each date.

Mr. PEARSE. I am not worrying about that.

Mr. WILLIAMS. It merely means dragging out the thing indefinitely if you do that, because the same thing applies as to each date.

The COURT. I am with you so far, Mr. Williams.

Mr. WILLIAMS. If my friend wishes to cross-examine any further as to his qualifications as an expert, of course he is offered for that purpose.

Mr. PEARSE. I will take care of that later.

Mr. WILLIAMS. It is usual to cross-examine at this time.

Q. Mr. Carpenter, for the purpose of the record will you please fix what you regard as the fair market value of this character of coal on the dates in question? You have before you an exhibit which you prepared which you described?

A. September 18, 1919—

Mr. PEARSE. I desire to interpose my former objection to this testimony and take an exception.

The COURT. Yes.

Mr. PEARSE. I do not understand that an exception is necessary.

Exception."

290 (4) The court erred in upholding the action of the trial court in the admission of evidence offered by the plaintiff at the trial, full substance of which is as follows:

"By the COURT:

Q. Is that a trade journal?

A. Yes; all three of those are trade journals.

Mr. PEARSE. If your honor please, I must object to this witness testifying with reference to these various magazines. It seems to me that the magazines themselves are the best evidence. There may be some very damaging statements in the magazines as to the plaintiff's case and as to what the condition of the market was and the circumstances of the market.

The COURT. I know; but he may be proving that something like a stock journal; if so I take it it is admissible.

Mr. WILLIAMS. It has been so ruled, sir; the Supreme Court of Maryland has distinctly ruled on the question. You can have a trade paper which is recognized as an authority.

Exception."

(5) The court erred in upholding the action of the trial court in refusing to permit the cross-examination by the defendant at the trial of the witness for the plaintiff, as follows

"By Mr. PEARSE:

Q. That is, that while the price for domestic was lower than the export price it was a price which yielded the coal company a profit?

Mr. WILLIAMS. I object to that. I do not think the question is proper.

The COURT. I do not see how the question is proper, Mr. Pearse.

Mr. PEARSE. Well, perhaps I was unskillful in framing my question.

The COURT. I understood you were trying to find out whether there was a factor of fifty cents in the variance between the domestic and import coal.

291 Mr. PEARSE. In an ordinary market?

The COURT. Now, as a coal man, would you say that there was that factor of fifty cents difference between export and domestic in use in the coal market; did you ever hear of it?

The WITNESS. Judge, it varies very materially.

Mr. PEARSE:

Q. Between fifty cents and a dollar?

A. It might be up to \$1.50. For instance, the United States Fuel Administrator acknowledged \$1.50 difference between inland and export in his price of \$4.53. He acknowledges \$1.50.

By the COURT:

Q. Then there is no definite factor of variation?

A. No, sir.

Q. Either fifty cents or \$1.50 or \$1.00, it varies, as circumstances arise?

A. As conditions arise.

By Mr. PEARSE:

Q. All right. Then, what, in your experience, in ordinary times would be the limit of variation between export and domestic trade?

A. What do you mean by——

Mr. WILLIAMS. Are we interested in ordinary times or ideal times?

Mr. PEARSE. Do you object to the question?

Mr. WILLIAMS. I object.

The COURT. Objection sustained.

Exception."

(6) The court erred in upholding the action of the trial court in refusing to permit the cross-examination by the defendant at the trial of the witness for the plaintiff as follows:

"By Mr. PEARSE:

Q. Then, if Colonel Wentz should have said that he heard of it being offered as high as \$16 or \$17 a ton f. o. b. tidewater, isolated cases, and that that was not the average market price, he would be mistaken, would he?

292 Mr. WILLIAMS. I object to that. It seems to me, if the court please, that this way of getting in Colonel Wentz's alleged testimony is not proper cross-examination.

Mr. PEARSE. Do not say alleged testimony.

Mr. WILLIAMS. I do not know anything about it.

Mr. PEARSE. You ought to know.

The COURT. I don't know, but it seems to me that unless Colonel Wentz is a witness here that the statements of Colonel Wentz are of no greater probative force than the statement of anybody that might be out on the curb.

Mr. PEARSE. My answer to that, sir, is this: That the witness himself—of course by my question it appears who Colonel Wentz is; that he is a coal man and that necessarily by reason of his position he must know something about the price of coal, and Mr. Carpenter has come here and has testified, and he has expert knowledge. I assume that he will agree with me that Colonel Wentz has some expert knowledge, and if he said something different from what Mr. Carpenter is saying it is perfectly legitimate cross-examination.

Mr. WILLIAMS. I object, if the court please, to this method of attempting to get before the jury the testimony which he could not offer to the jury. It is clearly improper. If Colonel Wentz is called here we have an opportunity to cross-examine him to see what he knows about it.

The COURT. Objection sustained.
Exception."

(7) The court erred in upholding the action of the trial court in refusing to permit the cross-examination by the defendant at the trial of the witness for the plaintiff, as follows:

"Cross-examination by Mr. PEARSE:

Q. Well, in the coal business, in which you say you have been engaged for a period of twelve years, have you ever known of a period when prices of coal changed so rapidly within the same period of time?

293 Mr. WILLIAMS. I object to that as entirely irrelevant.

We may have a very active market on the stock market, but if you fail to deliver the stock on that day you have to pay on that basis. You may have a very active market somewhere else, but if you fail to deliver on that day you have to pay that market.

Mr. PEARSE. It is your contention, then, that a market of that kind is a fair market?

Mr. WILLIAMS. The only possible measure of damages as between citizens or as between a Government and the citizens as to what a thing is worth is what you can get for it for gold dollars during that time.

The COURT. The objection is well taken; I will allow an exception.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Signed.)"

(8) The court erred in upholding the action of the trial court in the admission of evidence offered by the plaintiff at the trial, full substance of which is as follows:

"By Mr. WILLIAMS:

Q. Just give us those sales, Mr. Moon.

Mr. PEARSE. If your honor please, I object to that question. What particular difference does it make whether it is the Shipping Board or somebody else? Why should this be picked out as the criterion, this particular transaction?

Mr. WILLIAMS. It has a bearing on the prices.

Mr. PEARSE. To show it is a general market.

Mr. WILLIAMS. The best evidence of a market is the actual sales, especially actual sales to the Government, when you are contending here that they are not market prices; it is one Government indivisible—

The COURT. Let us have it.

Mr. PEARSE. Exception.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Signed.)”

294 (9) The court erred in upholding the action of the trial court in admitting evidence at the trial, Exhibits 1 and 2, on the part of the plaintiff, as follows:

“By Mr. PEARSE:

Q. And the word ‘fair’ then does not enter into your description of the market?

A. Well, I would consider what two people agree upon as a fair price.

Q. No matter whether one was compelled to do it and the other one was able to furnish him with the object—

Mr. WILLIAMS. I object to that word compel.

A. I do not want to pass as a moralist, but if you want to put me on record I will say that at times I thought the prices were too high. We are suffering to-day from high prices. I was paying \$125 for a suit of clothes that I did not want to pay, that I had to pay.

Q. You had to have clothes?

A. Yes; I paid \$125 for a suit of clothes in New York, and I went to London and bought this suit that I have on for \$47, which I regard as a better suit.

The COURT. Now, gentlemen, I think with all due respect to the Government of the United States, that the fallacy of the position taken is illustrated by the examination of this witness.

Mr. WILLIAMS. I offer in evidence the exhibits and the graph.

The COURT. How about the magazines themselves from which your excerpts were taken?

Mr. WILLIAMS. The magazines are here, sir; my friend is on record as saying he has no objection to these figures from the magazines. When we were using the exhibits, Mr. Pearse said that he had no objection to those figures.

Mr. PEARSE. I think those two exhibits were offered for identification. If your honor please, I wanted to object to the admission of those exhibits.

The COURT. I will hear you on their admission, Mr. Pearse, and I will deny your motion. The testimony shows that
295 they were compiled by a witness who was on the stand, that they represented a tabulation of actual sales, excerpts of magazines, and other circumstances which were entirely within his control.

As to the actual sales, the sales were O. K'd by him before being made, and the prices were noted by him, and the first exhibit was simply a codification of the actual sales slips made by the witness and O. K'd by him, which were here in court. Now, Exhibit 2 is a codification of the sales reports appearing on Exhibit 1, plus excerpts from the trade journals, the Black Diamond, Seward's Journal, and the Coal Trade Journal. And the trade papers themselves were here in court, and the excerpts and codifications on Exhibit 2 refer to the exact page of those respective journals wherein the information was taken from. It seems to me the exhibits are competent.

Mr. PEARSE. The only purpose of my objection is simply to have it on the record on the particular point I wanted to have on record, which is that Exhibit 1, and I think also Exhibit 2, purport to be sales known as spot sales for export trade, and I object to the use of such a paper for the reason that it would not seem that prices which were obtained for spot export coal are the proper prices upon which to base just compensation to which the plaintiff may be entitled.

The COURT. I will allow you an exception. The graph was marked Plaintiff's Exhibit 3. Government's counsel prays an exception, which is hereby allowed and sealed accordingly."

(10) The court erred in upholding the action of the trial court in sustaining an objection to a question on direct examination of one of the witnesses for the defendant, as follows:

"Direct examination by Mr. PEARSE:

Q. As a result of the advertising for bids, were any bids received?

A. Yes; there were twelve.

Q. And for what quantity of coal?

Mr. WILLIAMS. If the court please, I object. A bid
296 cannot possibly fix market price. A market price is fixed by actual transactions and that is the only issue here.

(Discussion off the record between court and counsel.)

The COURT. I sustain Mr. Williams' objection and strike out the entire line of testimony as irrelevant and incompetent on the question as to the compensation for coal commandeered and allow an exception.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Signed.)"

(11) The court erred in upholding the action of the trial court in sustaining an objection to a question on direct examination of one of the witnesses for the defendant, as follows:

“Direct examination by Mr. PEARSE:

Q. How was the coal in question commandeered?

Mr. WILLIAMS. I object to that.

Q. What methods were used as to quantity, as to time, and as to place?

Mr. WILLIAMS. I object to that.

The COURT. Objection sustained for the reason that the pleadings state the manner of the taking of the coal and exception allowed.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Sealed.)”

(12) The court erred in upholding the action of the trial court in sustaining an objection to a question on direct examination of one of the witnesses for the defendant, as follows:

“Direct examination by Mr. PEARSE:

297 Q. How much notice was given to the plaintiff in this case from time to time that it would be required to furnish coal for the Navy?

Mr. WILLIAMS. I object to that.

The COURT. Sustained.

(Exception.)”

(13) The court erred in upholding the action of the trial court in sustaining an objection to a question on direct examination of one of the witnesses for the defendant, as follows:

“Direct examination by Mr. PEARSE:

Q. Can you tell us whether or not, in your position in the bureau, you have made a study of the coal situation during the years 1919 and 1920 and the early part of 1921 with respect to the supply of coal, the demand for it, and the prices which obtained?

A. I have.

Q. As a result of that study and as a result of the advertising for bids by the Navy, was it possible for the Navy to secure coal under contract?

Mr. WILLIAMS. I object to that.

The COURT. Objection sustained.

Exception.”

(14) The court erred in upholding the action of the trial court in admitting into evidence testimony and documentary on the part of the plaintiff, as follows:

"Direct examination by Mr. PEARSE:

Q. In your investigation of the situation with respect to coal, what did you do?

Mr. WILLIAMS. I wonder if we might not have an offer of proof to save time, if the court please, if that is compatible with your practice. I ask for an offer of proof.

Mr. PEARSE. I don't know whether that will make my record good or not.

The COURT. I assume if I exclude your offer and allow you an exception it is as good a record as is obtainable on a point of this kind.

298 Mr. PEARSE. All right, sir. I desire to offer by this witness proof that the Navy advertised for bids for coal with a result that sufficient bids were not received to supply coal in sufficient quantities for the use of the Navy.

Mr. WILLIAMS. I do not want to break in, Mr. Pearse, but is it necessary to repeat what has been ruled out?

Mr. PEARSE. I am stating my offer. That as a result the Navy requisitioned under the authority of Congress a supply of coal for the years 1919, 1920, and 1921; that they fixed the price which they considered to be just compensation, using as basis for arriving at the figures reports of the Federal Trade Commission, based upon reports furnished to the Federal Trade Commission by the coal operators in this New River district as to the cost of producing coal and a reasonable margin of profit thereon, including all overhead and everything else in connection with the production of coal.

They also based their figures as a result of conferences with coal operators themselves, who advised the Navy as to what would be a just price and a reasonable price for the Navy to pay for coal. Some of the operators, and quite a large number of them, preferred that the coal should be requisitioned rather than that the Navy should contract for it, for reasons of their own. That they based those prices also on figures supplied by the Fuel Administration; that they did not consider that what is known as spot export prices should in any way govern the prices which should be paid to the coal operator for his coal but rather that as the coal was to be taken in small quantities each month, distributed among 67 companies operating in the district, that it was fair to fix a price which would be consistent with the fair contract price for coal.

I desire to show further by this witness that coal was supplied to the Panama Railroad Company and to other companies I believe, at a price which compared with the prices which the Navy allowed the plaintiff in this case. I also desire to show by this witness that while it is true that on particular dates,

set forth in the schedule attached to the complaint in the case, they were the days upon which the coal was actually delivered by the plaintiff to the Navy; that previous

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notice was given both by the requisition orders and by other notices which were sent out, so that ample time might be afforded the plaintiff in this case as well as the other co-operators as to what necessities of the Navy were at once, so as not to deplete the pool at Hampton Roads.

Mr. WILLIAMS. And I object to that in toto.

Mr. PEARSE. I also want to prove by this witness that it is customary in the coal trade to make contracts for coal in the month of April of each year to cover a period of either months or a year, and that there is a vast difference in the price which is paid for contract coal from the price paid for purely speculative coal such as has been testified to by the witnesses for the plaintiff. That the market at Hampton Roads was a purely speculative market and did not in any way represent the reasonable value of the article itself. Also that there is a distinction in the price between what is known as export coal, spot, and domestic coal spot, the price of coal for domestic use being much less than the prices that were obtained at Hampton Roads during this period for spot export coal.

I also desire to prove by this witness that Mr. Carpenter, the vice president of the company, furnished to the Navy through a letter written by him on February 19, 1919, figures to show what it cost his company to produce the coal, showing that the average cost of production during the year 1918 was \$2.79, and from those figures to show by this witness how the Government arrived at additional sums which increased the amount which the Government thought just compensation to be paid for the coal.

Also I wish to show by this witness and to offer in evidence letters written by this company in which they express a desire to be compensated for the coal which they took on the basis of cost plus, which is familiar to all of us.

300 The COURT. Now, there, are you going into the question of a waiver of its right under the commandeering statutes?

Mr. PEARSE. I had not intended to offer it for that purpose.

Mr. WILLIAMS. Of course, we would have resisted this, but it seems to me that is out of line. If you have any such letters I think you ought to produce the letters.

Mr. PEARSE. You do not mean to suggest that I was going to produce anything that I did not have?

The COURT. It occurs to me that letters purporting to show a willingness to take compensation arrived at by the Government would create a different legal aspect from any that we have had so far. So, I think that your offer as to what ought to be couched in possibly a different form; that the letters themselves ought to be offered, and I will rule on those later on.

Mr. PEARSE. I will do that later. I also desire to prove by this witness that out of 52 coal operators whose coal was requisi-

tioned all but ten have expressed their satisfaction with the prices set by the Navy, five have objected, and the other five have not been heard from. I would like to change that. Perhaps Commander Cobey had better state that; may he do that as though I were making the offer?

The COURT. Just let the stenographer have the figures of those who accepted and those who rejected it.

The WITNESS. There were 42 accepted and five objected and five have not been heard from.

The COURT. That is just as you stated it.

Mr. PEARSE. And out of those five who rejected it, one is the plaintiff in this suit who, with two others, have brought suit.

I also desire to show by this witness that there is such a variation in the price of coal that even in one of the suits which was brought by one of these five objecting companies, an allowance of \$5.50 was made by the court.

301 The COURT. Court or jury?

Mr. PEARSE. Court, no jury; the court sitting as a jury.

The COURT. Upon that offer I sustain the objection which Mr. Williams makes for the reason that it is incompetent in a suit brought for the recovery of damages for commandeering of coal taken. The offer to prove any of the facts and circumstances referred to in the offer as to the letters which you referred to, I will have to see those and see whether they might constitute a waiver of the right to demand just compensation that would be fixed by a jury for the property taken.

Mr. PEARSE. There are two of them right together.

Mr. WILLIAMS. I object to them.

The COURT. I will exclude the letter of May 26, 1920, purporting to be written by John E. McGowan to the Navy Department, Bureau of Supplies, for the reason that the same does not amount to a waiver of any legal rights which the plaintiff company might have. And the same with respect to the letter of November 4th, the letters being merely a willingness to compromise before this dispute actually arose.

Mr. PEARSE. In the court please, that is all I can think of now. I have two or three witnesses here who will probably suffer the same fate, who come from Washington.

The COURT. You can state your other offers to-morrow morning. Suppose you swear those witnesses.

DAVID L. WING, called as a witnesses on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. PEARSE:

Q. What is your business?

A. Statistician and economist, Washington, D. C.
(Witness withdrawn.)

Mr. PEARSE. If the court please, may I finish the offer which I was making yesterday with respect to some of the witnesses that returned to Washington?

302 The COURT. Yes.

Mr. PEARSE. I make a mistake in describing Mr. Napier as occupying the same official position as Mr. Durand. In all other respects his testimony will be the same, but his position is acting chief accountant of the Federal Trade Commission.

Then Mr. Wing was sworn and I offered to prove by him in the first place that he is an expert on the cost of mining and producing coal, including export coal, on prices other than purely market prices, and we offer him for the purpose of proving what it cost to produce this coal together with what would be a reasonable profit to be made thereon, and that through his connection with the other departments of the Government who are engaged in this work he was in conference with the Shipping Board of the Navy and the Bureau of Supplies and Accounts concerning the prices fixed by the Navy for the coal of the plaintiff which was taken. I understand that your honor overruled that?

The COURT. Yes.

Mr. PEARSE. Exception.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Signed.)"

(15) The court erred in upholding the action of the trial court in refusing to admit in evidence certain letters written by the plaintiff to the representatives of the defendant:

" By Mr. PEARSE:

Q. Commander Cobey, have you here with you all the letters or copies of letters passing between the Navy Department and the plaintiff in this case with reference to the coal in question?

A. We have.

Mr. PEARSE. I offer those letters in evidence.

Mr. WILLIAMS. I think they should be considered one by one, if the court please.

Mr. PEARSE. All right.

The COURT. Mr. Pearse, what is the legal effect claimed for the letters?

303 Mr. PEARSE. They show the circumstances under which the Navy took the coal, the correspondence containing the prices to be paid for the coal, and the amount of the coal which was taken, the distribution of the taking of the coal over different periods so as to be fair to the plaintiff, and the quantity taken from that particular company.

The COURT. Do they anywhere show an acceptance by the plaintiff company of the proposition of the Navy?

Mr. PEARSE. Frankly, I believe I must answer that question in the negative except in so far as it may be inferred from the

two letters which were rejected yesterday as being the opinion of the plaintiff of the prices which it should be paid for the coal. Your honor will recall the contents of those letters.

The COURT. Yes; but those letters which I read—those two letters—indicated to my mind that there had been negotiations with respect to coal; that there had been no agreement with respect to coal; and that the plaintiff terminated the negotiations. Therefore, the Navy's right not resting in contract must rest under the statute. Now, if they rest under the statute it becomes a question for a court and jury as to what is just compensation, and upon that question what some official of the Government may say has no bearing where the commodity is dealt in on the open market.

Now, there is no proof to show that there was not a market for this kind and quality of coal at Hampton Roads at the time; that fact is uncontroverted. Therefore, there is but a single question and that is, What is the market price?

Mr. PEARSE. The fair market price.

The COURT. What is the market price. You are not dealing now in real estate. You are dealing in a commodity, personal property. What is its market price?

Now, if the letters tend to show that there was a contract, then the Navy ought not to stand on the commandeering
304 but ought to defend the action on the theory that there was an agreement with respect to the taking of the coal.

Mr. PEARSE. As I have already stated, we can not go that far. I can not state that the contents of those letters will reveal any such situation.

The COURT. Now, has the Government any proof that there was not a market?

Mr. PEARSE. That is what I am going to ask Commander Cobey; qualify him as an expert, and bring that out to the best of my ability.

Mr. WILLIAMS. There was an offer of letters, if the court please. I object to them.

The COURT. Your objection to the offer of the letters is sustained, and counsel for the Government has an exception.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly. Exhibits 1 and 2."

(16) The court erred in upholding the action of the trial court in refusing to admit in evidence records of the departments of the Government as follows, being the exhibits attached to the record in the case, namely, Exhibits "G. 1 to G. 34, inclusive," as follows:

"By Mr. PEARSE:

Q. What do those reports and other data consist of?

A. They consist of reports received; they are reports of conferences held with suppliers of coal from this field where the plaintiff's coal came; they are reports from the United States Senate Committee on Reproduction and Construction that held

various Senate hearings on coal; they are reports from the Senate Committee on Manufactures, that held hearings on coal for several months; reports from the Interstate Commerce Commission and other governmental departments; also other operators, of what they considered the price to be for coal.

Q. And that information is all contained in the records which I have just referred to?

A. Yes; certified copies, certified by the Secretary of the Navy.

305 Mr. PEARSE. I offer all those records in evidence.

Mr. WILLIAMS. I object to them.

The COURT. Objection sustained.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Signed.)"

(17) The court erred in upholding the action of the trial court in sustaining an objection to a question on direct examination of one of the witnesses for the defendant, as follows:

"By Mr. PEARSE:

Q. In the coal trade does the sale of a small quantity of coal or the sale of small quantities of coal such as the spot sales which have been described as being by the other witnesses, are they sufficient to create what would be considered in the trade as a market upon which the price of coal could be based?

Mr. WILLIAMS. I object to that.

The COURT. Objection sustained and I will allow an exception.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Signed.)"

(18) The court erred in upholding the action of the trial court in sustaining an objection to a question on direct examination of one of the witnesses for the defendant, as follows:

"By Mr. PEARSE:

Q. Is the market price of coal regulated and fixed in the same manner as would be fixed the market price of shares of stock where one or a few quotations were made?

Mr. WILLIAMS. I object to that.

The COURT. Objection sustained.

306 Q. What is the coal market?

Mr. WILLIAMS. That question I object to, if the court please. We have had the facts from the witness that there was a market.

Mr. PEARSE. Oh, do not keep rubbing that in. He says he admits coal was bought and sold; he has not said there was a market; he said there was not a market.

The COURT. Now, gentlemen, the objection is sustained.

Mr. PEARSE. Do I understand that your honor will not let him define what a market is for coal?

The COURT. I think that we have had a great deal of testimony to the effect that there was a market; the witness has said that there was a coal market, so that I do not see that it is necessary to have it defined.

By Mr. PEARSE:

Q. Do I understand from the answers which you have made to any questions which have been asked you that it is your opinion that there was a market for coal during this period upon which the price of coal could be fixed?

Mr. WILLIAMS. I object to that.

The COURT. I think we are traveling right back again to where we started from.

Q. If you said that there was a market for coal in answer to any question, what did you mean?

Mr. WILLIAMS. I object to that.

The COURT. Objection sustained."

(19) The court erred in upholding the action of the trial court in sustaining an objection to a question on direct examination of one of the witnesses for the defendant, as follows:

"By Mr. PEARSE:

Q. The witnesses for the plaintiff have testified, after
307 giving certain figures as shown by the exhibits, that in their opinion there was a fair market and fair market price for coal during the periods in question. From your experience and familiarity with the coal situation, is that so?

Mr. WILLIAMS. I object to that.

The COURT. Objection sustained. Exception.

Mr. PEARSE. If your honor please, I do not want to keep arguing, but why should he be not allowed to express an opinion as well as these other fellows?

The COURT. I take it, Mr. Pearse, that the question here is Was there a market? They have all said there was a market. The next question is, What was the market price? As to the market price, the plaintiff's witnesses vary as between themselves. Now, if you can show by this witness or any other witness that the market price was different from what has been testified to as to the market price, there are variations as between the plaintiff's own witnesses, so that the jury will have to solve that problem, then I would allow this witness to testify as to the incorrectness of the market price as testified to, and testify as to his best judgment as to what the market price was.

Mr. WILLIAMS. After he has qualified himself fully as an expert.

The COURT. As an expert on the market.

By Mr. PEARSE:

Q. During the period in question, while there may have been isolated sales of coal, was there any recognized author or source to which the Navy could go in order to ascertain what the price of coal was?

Mr. WILLIAMS. I object.

The COURT. Objection sustained.

Exception."

(20) The court erred in upholding the action of the trial court in sustaining an objection to a question on direct examination of one of the witnesses for the defendant as follows:

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"By the COURT:

Q. In that they do not represent what the petition calls for, a fair market value.

The COURT. You better strike all of this evidence out, every bit of it; it is entirely irrelevant and incompetent.

Mr. PEARSE. Your honor will allow me an exception to that?

The COURT. Surely.

Government's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Signed.)"

(21) The court erred in upholding the action of the trial court in sustaining an objection to a question on direct examination of one of the witnesses for the defendant, as follows:

"By Mr. PEARSE:

Q. I do not think I have asked this question. In your opinion, was there a free market for the sale of coal from September 19 to January 21, 1921, for the grade of coal involved in this suit?

Mr. WILLIAMS. I object to that.

The COURT. Objection sustained."

(22) The court erred in upholding the action of the trial court in sustaining an objection to a question on direct examination of one of the witnesses for the defendant, as follows:

"By Mr. PEARSE:

Q. Take that schedule. What was the price fixed for the sale of coal by the Navy in September, 1919?

Mr. WILLIAMS. If the court please, I was about to say the plaintiff admits that he had received from the defendant the sum of \$97,354.56 since the bringing of this suit, being the amount allowed by the Navy in accordance with its notion of its duty under the law.

309 Mr. PEARSE. Does your honor overrule my question?

The COURT. Yes; I do.

Exception."

(23) The court erred in upholding the action of the trial court in not charging the jury as requested by the defendant, as follows:

(1) The market price at which coal was sold by the plaintiff for export at spot prices—that is, for prices which contemplated immediate delivery without any previous order or contract upon which the time and place of delivery were based and the price to be paid—is not alone the basis upon which just compensation shall be determined.

(24) The court erred in upholding the action of the trial court in not charging the jury as requested by the defendant, as follows:

(2) The price which the plaintiff could get for its coal at tidewater for export uses and for shipping going to foreign ports at or about the same time or place when and where the coal was taken by the defendant is not binding upon the jury in determining the value of the coal taken, although it may be evidence which may be considered in arriving at what the jury believes, from all the evidence in the case, to be just compensation for the coal taken.

(25) The court erred in upholding the action of the trial court in not charging the jury as requested by the defendant, as follows:

(3) The market price of an article is only a means of arriving at compensation. It is not in itself the value of the article but is evidence of value upon which just compensation may be based or determined. The law adopts fair market price as a natural inference of fact but not as a conclusive legal presumption.

(26) The court erred in upholding the action of the trial court in not charging the jury as requested by the defendant, as follows:

310 (4) The Constitution protects persons with respect to the taking of private property for public use, and guarantees that for all property taken for public uses just compensation shall be paid. This compensation, however, must be just, not only to the person whose property is taken, but also to the public which is to pay for it.

(27) The court erred in upholding the action of the trial court in not charging the jury as requested by the defendant as follows:

(5) Just compensation means full and fair equivalent for the loss sustained for the taking for public uses, the exercise of the power of taking public property for public use being necessary for the public good, and all property being held subject to the exercise of this power when and as the public good requires it, it would be unjust to the public that it should be required to pay the owner more than a fair indemnity for the loss he sustains by the appropriation of his property for the general public good.

(28) The court erred in upholding the action of the trial court in not charging the jury as requested by the defendant as follows:

(6) To arrive at what is just compensation, the interest of the public and of the owner of the property and of all the circumstances of the particular appropriation should be taken into consideration, and in determining what is just compensation, the price for which the property might be sold for a particular purpose is not conclusive evidence.

(29) The court erred in upholding the action of the trial court in not charging the jury as requested by the defendant as follows:

(7) In determining what is just compensation, the jury may consider not only the price which the coal would bring for export trade at "spot," but also the prices fixed by the Navy and the manner in which, and the sources from which its information was obtained in fixing these prices, for example, the cost of production plus a reasonable profit, bearing in mind that this price should be not only just to the supplier, but also just to the Government.

311 (30) The court erred in upholding the action of the trial court in not charging the jury as requested by the defendant, as follows:

(8) In determining what is just compensation, the jury may consider the price which the coal would bring on the basis of contracts for the sale of coal covering definite periods of time, also the prices at which coal could be sold for "spot" for domestic use.

(31) The court erred in upholding the action of the trial court in not charging the jury as requested by the defendant, as follows:

(9) In determining what is just compensation, the jury may consider any evidence which may be produced to show that the prices obtained by plaintiff for coal, other than the coal taken at the same time and place, were affected by restrictions upon the quantity which might be sold, and any other evidence which may be produced to show that the market was not free and unrestricted.

(32) The court erred in upholding the action of the trial court in not charging the jury as requested by the defendant, as follows:

(10) In determining the amount of damages to be awarded, the plaintiff is not entitled to interest, as interest is only awarded against the Government of the United States, where the Government has expressly contracted to pay interest, or where the particular statute under which suit is brought authorizes the recovery of interest.

(33) The court erred in upholding the action of the trial court in not charging the jury as requested by the defendant, as follows:

(11) The burden of proof is upon the plaintiff to show that the compensation fixed by the President in accordance with the provisions of the law governing the requisitions of this kind is not just compensation.

312 (34) The court erred in upholding the action of the trial court in not charging the jury as requested by the defendant, as follows:

(12) In taking into consideration the evidence as to prices at which the coal was sold by the plaintiff and others, the plaintiff must show that the prices obtained were such as would obtain in a free, open, and unrestricted market, and that the buyers did not pay the price asked by the sellers of coal through force of circumstances over which they had no control.

(35) The court erred in upholding the action of the trial court in not charging the jury as requested by the defendant, as follows:

(13) The Government of the United States is not to be penalized for the taking of the coal of the plaintiff and is not required to pay other than a reasonable price for the coal taken; that is, a price which will be fair to the public who pay for the coal and which will reasonably compensate the plaintiff whose coal has been taken.

(36) The court erred in upholding the action of the trial court in not charging the jury as requested by the defendant, as follows:

(14) The price to be paid for the coal taken is not the highest price which the plaintiff could obtain under any circumstances and for all available uses and purposes for which the coal might be used.

(37) The court erred in upholding the action of the trial court in not charging the jury as requested by the defendant, as follows:

(15) While the price which the plaintiff might obtain for its coal in a market may be evidence upon which to base just compensation, the plaintiff must first show that there was free competition in the market under normal circumstances, with a seller not forced to sell and a buyer not compelled to buy.

313 In the absence of this proof the price obtained is not a standard upon which just compensation may be based, as the coal which was taken by the Government from the plaintiff was necessary for the maintenance of the Navy of the United States. The measure of just compensation which the Government must pay the plaintiff should not be based upon exorbitant prices resulting from a shortage due to the Government restrictions placed upon the market for the protection of its citizens, thereby affecting the stable condition of the market and preventing free and open market conditions.

(38) The court erred in upholding the action of the trial court in not charging the jury as requested by the defendant, as follows:

(16) In determining the question as to whether or not there existed a fair market during the period in question, the jury may consider the range of the alleged market prices, namely, prices varying from \$5.00 to \$16.00, as set forth in the bill of complaint.

Government's counsel prays an exception to the refusal to charge above requests, which exception is hereby allowed and sealed accordingly.

(Signed.)"

(39) The court erred in upholding the action of the trial court in its entire charge to the jury and to all of which an exception was taken by the defendant, as follows:

"The COURT. I will allow an exception to the Government as to each and every part and parcel of my charge.

Mr. PEARSE. I do not object to the whole of it, sir. There are only one or two points that I would like to mention unless you think that covers the situation.

The COURT. Yes; you may have an exception, which is hereby allowed and sealed accordingly.

(Signed.)"

314

WALTER G. WINNE,
U. S. Attorney,

FREDERIC M. P. PEARSE,
Asst. U. S. Attorney,

Attorneys for defendant (plaintiff in error).

315-317 (Endorsed:) 2736. Circuit Court of Appeals of the United States for the Third Circuit. The New River Collieries Company, plaintiff, defendant in error, vs. United States of America, defendant, plaintiff in error (three cases consolidated). Assignments of error of the defendant, United States of America. Received & filed Mar. 1, 1922. Saunders Lewis, jr., clerk.

318 Circuit Court of Appeals of the United States for the Third Circuit.

THE NEW RIVER COLLIERIES COMPANY, plaintiff-defendant in error, <i>vs.</i> UNITED STATES OF AMERICA, DEFENDANT- plaintiff in error.	}	Action at law. (Three cases consolidated.)
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Petition for writ of error.

To the honorable the judges of the Circuit Court of Appeals of the United States for the Third Circuit:

And now comes United States of America, defendant in the above entitled cause, by Walter G. Winne, United States attorney for the district of New Jersey, and Frederic M. P. Pearse, assistant United States attorney, and says that on the 7th day of December, 1921, the court entered judgment herein on the writ of error of the defendant from the United States District Court for the District of New Jersey, affirming the judgment of said court in favor of the plaintiff and

against the defendant, for the sum of \$213,100.11 in the first case; \$19,700.91 in the second case; \$9,270.27 in the third case, in which final judgments and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant, all of which will more fully appear in the assignment of errors which is filed with this petition.

Wherefore this defendant prays that a writ of error may issue in this behalf to the United States Supreme Court for the
319 correction of the errors so complained of and that a transcript of the record of the proceedings and papers in this cause duly authenticated may be sent to the said court.

WALTER G. WINNE,
U. S. Attorney,

FREDERIC M. P. PEARSE,
Asst. U. S. Attorney,

Attorneys for defendant (defendant-plaintiff in error).

320-321 (Endorsed:) 2736. Circuit Court of Appeals of the United States for the Third Circuit. The New River Collieries Company, plaintiff, defendant in error, vs. United States of America, defendant, plaintiff in error (three cases consolidated). Petition for writ of error. Received & filed Mar. 1, 1922. Saunders Lewis, jr., clerk.

322 Circuit Court of Appeals of the United States for the Third Circuit.

THE NEW RIVER COLLIERIES COMPANY,
plaintiff-defendant in error,

vs.

UNITED STATES OF AMERICA, DEFENDANT-
plaintiff in error.

Action at law. (Three cases consolidated.)

Order allowing writ of error.

This first day of March, 1922, came the defendant-plaintiff in error, United States of America, by Walter G. Winne, United States attorney, and Frederic M. P. Pearse, assistant United States attorney, and filed herein and presented to the court its petition praying for the allowance of a writ of error intended to be urged by it; praying also that a transcript of record and proceedings and papers, upon which the judgments herein were rendered, duly authenticated, may be sent to the United States Supreme Court, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court has allowed the writ of error.

J. WARREN DAVIS, Judge.

323-324 (Endorsed:) 2736. Circuit Court of Appeals of the United States for the Third Circuit. The New River Collieries Company, plaintiff-defendant in error, vs. United States of America, defendant-plaintiff in error. Order allowing writ of error. Received & filed Mar. 1, 1922. Saunders Lewis, jr., clerk.

325 Circuit Court of Appeals of the United States for the Third Circuit.

[SEAL.]

Writ of error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable judges of the Circuit Court of Appeals of the United States for the Third Circuit, greeting:

Because, in the record and proceedings and also in the rendition of the judgments of a plea which is in the said United States Circuit Court of Appeals before you, or some of you, between New River Collieries Company, plaintiff, and United States of America, defendant, affirming judgments of the United States District Court for the District of New Jersey, manifest error hath happened, to the great damage of the said United States of America, plaintiff in error, as appears by its complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf.

Do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, together with this writ, to the United States Supreme Court, so that you have the same at the city of Washington, in the District of Columbia, on the first day of April, 1922, in the United States Supreme Court, 326 to be then and there held, that the record and proceedings aforesaid being inspected, said United States Supreme Court may cause further to be done thereon to correct the error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, this first day of March, in the year of our Lord one thousand nine hundred and twenty-two, and of the independence of the United States the one hundred and forty-fifth.

SAUNDERS LEWIS, Jr.,

Clerk United States Circuit Court of Appeals for the Third Circuit.

I allow this writ.

J. WARREN DAVIS, *Judge.*

328-329 (Endorsed:) Circuit Court of Appeals of the United States for the Third Circuit. The New River Collieries Company, plaintiff, defendant in error, vs. United States of America,

defendant, plaintiff in error. (Three cases consolidated.) Writ of error.

330

Citation.

UNITED STATES OF AMERICA, ss:

Nos. 2756-2836-2926.

To New River Collieries Company.

GREETING: You are hereby cited and admonished to be and appear before the United States Supreme Court, to be holden at the city of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the United States Circuit Court of Appeals, Third Circuit, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgments rendered against the said plaintiff in error affirming the judgments of the United States District Court for the District of New Jersey, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand within the Third Circuit of the United States, this first day of March, in the year of our Lord one thousand nine hundred and twenty-two.

J. WARREN DAVIS, *Judge.*

331-332 (Endorsed:) Circuit Court of Appeals of the United States for the Third Circuit. The New River Collieries Company, plaintiff, defendant in error, vs. United States of America, defendant, plaintiff in error. (Three cases consolidated.) *Citation.*

333 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct:

I, Saunders Lewis, jr., clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in this court in the case of United States, plaintiff in error, vs. New River Collieries Co., defendant in error, on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this eleventh day of March, in the year of our Lord one thousand nine hundred and twenty-two, and of the independence of the United States the one hundred and forty-sixth.

[SEAL.]

SAUNDERS LEWIS, Jr.,

Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

334 Circuit Court of Appeals of the United States for the Third Circuit.

(Seal.)

Writ of error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Judges of the Circuit Court of Appeals of the United States, for the Third Circuit, Greeting:

Because, in the record and proceedings and also in the rendition of the judgments of a plea, which is in the said United States Circuit Court of Appeals before you, or some of you, between New River Collieries Company, plaintiff, and United States of America, defendant, affirming judgments of the United States District Court for the District of New Jersey, manifest error hath happened, to the great damage of the said United States of America, plaintiff in error, as appears by its complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf.

Do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, together with this writ, to the United States Supreme Court, so that you have the same at the City of Washington in the District of Columbia, on the first day of April, 1922, in the United States Supreme Court, 335 to be then and there held, that the record and proceedings aforesaid being inspected, said United States Supreme Court may cause further to be done thereon to correct the error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, this first day of March, in the year of our Lord one thousand nine hundred and twenty-two, and of the independence of the United States the one hundred and forty-fifth.

SAUNDERS LEWIS, Jr.,
*Clerk United States Circuit Court of
Appeals for the Third Circuit.*

I allow this writ.

J. WARREN DAVIS, *Judge.*

336-337 (Endorsed:) 2736. Circuit Court of Appeals of the United States for the Third Circuit. The New River Collieries Company, plaintiff, defendant in error, vs. United States of America, defendant, plaintiff in error. (Three cases consolidated.) Writ of error, office of the clerk, Supreme Court, U. S., received March 13, 1922.

File No. 28797. United States Circuit Court of Appeals, Second Circuit. Term No. 316. The United States of America, plaintiff in error, vs. New River Collieries Company. Filed March 30th, 1922. File No. 28797.

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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE UNITED STATES OF AMERICA, PLAINTIFF	} No. 316.
IN ERROR,	
v.	
NEW RIVER COLLIERIES COMPANY.	

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE UNITED STATES.

The sole question involved in this case is the amount of compensation the plaintiff is entitled to for upwards of 60,000 tons of coal which the Navy requisitioned at Hampton Roads on different dates between September 18, 1919, and January 18, 1921. There is no dispute as to the number of tons taken nor as to the dates on which the coal was requisitioned, these facts being admitted by the pleadings. The requisition took place under §10¹ of the Lever Act, 40 Stat. 276, 279. In accordance with the provi-

¹ That the President is authorized, from time to time, to requisition * * * fuels; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation (etc.).

sions of this section, the President, through the Navy, in September, 1919, fixed the amount of just compensation at \$3.08 a ton. In order to take care of a wage increase allowed by the mine operators to the miners, this amount was, at a subsequent date, increased to \$3.33 a ton; and still later to \$4.42 a ton (125). The plaintiff declined to accept these prices.

In accordance with the provisions of that section it was paid 75 per cent of what it was entitled to on the basis of these figures,² and thereupon brought this suit to recover what it conceived to be just compensation, less, of course, the 75 per cent already received. Three complaints in all were filed, covering different periods. But the allegations in each are the same, and the cases were accordingly consolidated for the purposes of trial. The prices which the plaintiff sought to recover ranged from \$5 a ton in September, 1919, to \$4.70 in January, 1921, the highest price being reached in August, 1920, the plaintiff claiming compensation at the rate of \$16 a ton for the coal requisitioned during that month. The plaintiff at the trial introduced evidence of certain market prices prevailing at Hampton Roads on the various dates the coal was requisitioned, the prices being substantially in accordance with the schedules annexed to the complaints. The government contended that the market through-

² The plaintiff had not, at the time of trial, actually received the full 75 per cent, but it was stipulated that the case should proceed as though this percentage had been paid in full, the plaintiff having received assurances that this sum would in due time be paid.

out the period in question was a speculative and abnormal one, justifying a departure from the usual rule that the value of an article is to be determined by the market price. While not denying that these market prices were admissible in evidence as affording some aid to the jury in determining the compensation to be allowed, the government, nevertheless, contended that it should be allowed to prove the *real* as distinguished from the *market* value of the coal. But the court would not allow the testimony to be introduced. The government offered no testimony contradicting that given by the plaintiff's witnesses as to market prices, and the court would have directed a verdict had it not been for the fact that there was a slight disagreement among the plaintiff's witnesses as to the market prices on certain dates.

It developed at the trial that there were in fact two markets, one domestic and the other export, the domestic being lower than the export. The extent of the difference between the two was not shown, the court refusing to allow the government to introduce such evidence. The testimony, however, developed the fact that during the period the Fuel Administration was functioning—November 1, 1919, to April 1, 1920—the export price was \$4.536, while the domestic price was about \$1.50 per ton lower.

At this juncture it is important to an understanding of the case that we define certain terms employed by the witnesses during the trial. Contract coal, as the term implies, is coal furnished by mines under a

contract entered into in advance, usually in April of each year, delivery to be made in designated quantities throughout the life of the contract in accordance with its terms. Spot coal, as the term also implies, is coal that is not contracted for in advance; in other words, coal sold for immediate delivery. Free coal is coal on hand not immediately required for the fulfillment of a contract, and is in substance the same as spot coal. Free coal arose in two ways. It would sometimes happen that the carrier in placing empties at the mines would deliver more than the number ordered, and this would result in allowing them to be loaded with free coal. It would also happen that on the arrival at Hampton Roads of cars loaded with contract coal, the vessel for which the coal was intended had been delayed by storm or other causes. Accordingly if there was sufficient time to permit hauling the cars back to the mines for reloading and reshipment, this course would be followed, with the result that the coal in the first shipment would become free coal. The plaintiff during the period in question sold about 907,000 tons a year, 610,000 of which went into the export and bunker trade. Of the 907,000 tons about 35 per cent was contract coal, about 33 per cent spot coal, and about 31 per cent coastwise and inland coal.

What the price of the contract coal was does not appear. Of course it would vary according to the contract, but the court would not permit the Government to go into this matter. There is no evidence in the case from which it can be determined whether

the coal that was requisitioned was free or contract coal. The plaintiff, however, introduced evidence to the effect that the demand for export coal was strong and that the plaintiff would have had no difficulty in selling in the spot export market the coal which the government requisitioned; and its position was that inasmuch as this market offered the highest prices obtainable for coal, just compensation demanded that it should be paid on the basis of that market. The trial court adopted this view and charged the jury accordingly. The plaintiff recovered judgment for upwards of \$242,000, which on error was affirmed by the Court of Appeals.

This statement is intended to give only a general outline of the case. As the discussion proceeds it will be necessary to examine portions of the testimony in detail, and appropriate page references to the record will then be given.

While the case, in its immediate aspect, presents only the question of how just compensation is to be determined, as that term is employed in §10 of the Lever Act, it will nevertheless be seen, from what we have already said, that the meaning of those words as used in the Fifth Amendment is necessarily involved.

ASSIGNMENTS OF ERROR.

Our assignments of error, 39 in number and comprising 21 printed pages, need not of course be repeated here.³ They present in substance two

³ These assignments come close to falling within the criticism contained in *Central Vermont Ry. Co. v. White*, 238 U. S. 507, but no one can deny that they fairly raise the questions which we here discuss.

questions: (1) Whether, under the circumstances disclosed by this record, market prices must alone control in determining just compensation; and (2) whether, if market prices are to control, it was improper to exclude any evidence offered by the government as to the market price of domestic as distinguished from export coal, and also whether evidence offered by the government of the contract market value of coal was improperly excluded.

Our brief will accordingly be divided into two main divisions:

1. The court was wrong in refusing, under the circumstances disclosed by this record, to allow the government to introduce evidence of the real value of the coal as distinguished from its market value, and in holding that the market prices of this commodity were alone controlling in determining just compensation.

2. Even if we are wrong in maintaining, under the circumstances disclosed by this record, that market prices are not controlling, the court nevertheless committed error in refusing to admit evidence as to domestic market prices and in holding that spot export market prices alone control.

The court was wrong in refusing, under the circumstances disclosed by this record, to allow the government to introduce evidence of the real value of the coal as distinguished from its market value, and in holding that the market prices of this commodity were alone controlling in determining just compensation.

IT IS UNDENIABLY TRUE THAT MARKET VALUE USUALLY FURNISHES THE BASIS FOR DETERMINING THE PECUNIARY EQUIVALENT OF A GIVEN ARTICLE. BUT SOMETIMES AN ARTICLE HAS NO MARKET VALUE, IN WHICH CASE PROOF OF REAL VALUE IS ADMISSIBLE. THIS DEMONSTRATES THAT MARKET VALUE AND JUST COMPENSATION ARE NOT NECESSARILY SYNONYMOUS. IF THAT WERE THE CASE THE COURTS WOULD BE POWERLESS TO AWARD COMPENSATION FOR AN ARTICLE HAVING NO MARKET VALUE.

It is of course axiomatic that proof of real value is admissible where there is no market value.

1 *Sedgwick on Damages* (9th ed.), §§250, 251.

The Harmonides, (1903) P. 1.

This demonstrates that just compensation does not *necessarily* mean market value.

JUST COMPENSATION AND REASONABLE COMPENSATION
MEAN THE SAME THING.

Sweet v. Rechel, 159 U. S. 380, 400.

Neither term of course justifies the conclusion that compensation *must* be measured by market value. Testimony as to market value may be a convenient method of determining just compensation. But it is certainly not the only method. The fundamental inquiry, after all, is, what is *just* compensation. And market value is merely the means, but not necessarily the *only* means, of finding an answer to this inquiry.

THIS COURT HAS DECLARED THAT JUST COMPENSATION MUST BE A FULL AND FAIR EQUIVALENT FOR THE PROPERTY TAKEN. BUT OBVIOUSLY THIS CAN NOT MEAN THAT MARKET VALUE AFFORDS THE ONLY RULE FOR DETERMINING WHAT THIS EQUIVALENT IS.

In *Monongahela Nav. Co. v. United States*, 148 U. S. 312, this court declared unconstitutional an act of Congress which, in directing condemnation proceedings for the acquisition of a lock and dam in a navigable river, attempted to provide that the company's franchise to collect tolls, given to it by the state of Pennsylvania, must be excluded in ascertaining the compensation to which it was entitled. In speaking of the Fifth Amendment the court says (p. 326):

The noun "compensation," standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective "just." There can, in view of the combination of those two words, be no doubt that the

compensation must be a full and perfect equivalent for the property taken.⁴

We may therefore accept it as settled law that the owner is entitled to the "full and perfect equivalent" of property taken for public uses. But this still leaves open the question as to how this equivalent is to be ascertained. The case falls far short of establishing the proposition that market value alone is to be resorted to.

The court went on to say (p. 327):

It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation.⁵ The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

THE PRINCIPLE WE CONTEND FOR IS STRIKINGLY EXEMPLIFIED BY THE DECISION OF THE SUPREME COURT OF MASSACHUSETTS IN *BEALE V. BOSTON*, 166 MASS. 53.

In this case Beale, the owner, laid out a ten-acre tract into lots and streets, one of which—Tuttle

⁴On the main question—the constitutionality of the act declaring that no allowance shall be made for the value of the franchise to collect tolls—the case has been limited and explained, if not indeed impliedly overruled. *Lewis Blue Point Oyster Co. v. Briggs*, 229 U. S. 82; *Greenleaf Lbr. Co. v. Garrison*, 237 U. S. 251. But that is not material here.

⁵Although the present case does not raise the question, the correctness of the latter part of this statement must nevertheless be challenged. It is inconsistent with *Bauman v. Ross*, 167 U. S. 548. See also *McGovern v. New York*, 229 U. S. 363, and *McCoy v. Union Elevated R. R. Co.*, 247 U. S. 354, which, although involving the Fourteenth Amendment, are nevertheless apposite. What the court probably meant to say was that Congress was powerless to prescribe any measure of compensation which would in effect rob the owner of this constitutional guarantee.

street—the city of Boston later sought to condemn for a public highway. Beale sought damages both for the property actually taken and for the diminished value of his land abutting on the condemned area. As already indicated, the property sought to be taken was in fact a street, but not a public street, although it was burdened with easements in favor of abutting lot owners. In order to prove the worth of the condemned area—Tuttle street—Beale offered evidence of value other than market value. But the court ruled that this was inadmissible and that market value alone must control. The jury were charged in accordance with this view. On Beale's appeal the judgment was reversed, the court saying (p. 55):

The jury were thus limited exclusively to a consideration of market values; and this, having regard to the nature and situation of the land taken, we think was erroneous. Ordinarily, where the value of lands or goods is to be ascertained, and they are of such a kind and so situated as to be available for sale in the ordinary course of trade or dealing, the market value is perhaps the best test, and under such circumstances it is usually adopted in this Commonwealth. * * * But market value is not a universal test, and cases often arise where some other mode of ascertaining value must be resorted to.

The petitioner retained the ownership of Tuttle Street, subject to rights of way and drainage which he had granted therein. This title might not be salable in the ordinary

course of dealing, and yet it might have a real value to him, for which he was entitled to be paid.

It will thus be seen that evidence of market value was in fact introduced, and the jury's verdict was based on that sort of proof; but the court was of the opinion that, under the circumstances, it was unjust to limit the proof to market value alone. That is exactly what we contend for here.

To the same effect see *Wall v. Platt*, 169 Mass. 398.

THE MARKET VALUE OF AN ARTICLE IS ONLY A MEANS
OF ARRIVING AT ITS REAL VALUE.

"The market price of an article is only a means of arriving at its real value. It is not itself the value of the article, but it is evidence of the value. The law adopts it as a natural inference of fact, but not as a conclusive legal presumption." *Hale on Damages*, 274.

"Wherever the measure of damages involves the question of value, however much the market may be resorted to to determine what the value is, this resort is had as furnishing usually the best *evidence* of value." 1 *Sedgwick on Damages* (9th ed.), § 243.

THE PROOF INTRODUCED IN THIS CASE SHOWS BEYOND ALL QUESTION AN INFLATED MARKET AND DEMONSTRATES THE INJUSTICE OF BASING JUST COMPENSATION ON SUCH MARKET PRICES.

From October 31, 1919, to April 1, 1920, the Fuel Administration fixed the export price at \$4.536 a ton at the mines (42, 86, 94, 97). The proof introduced by the plaintiff shows that the moment government

price fixing regulation was withdrawn, the price rapidly advanced. This is graphically portrayed by one of the questions and answers: "Q. And apparently from the figures which you have given, as soon as the lid was off the price went up? A. It looks that way" (86). By July and August, 1920, the price, according to one of the claimant's witnesses, had amounted to \$16 a ton (43, 75), and, according to another, to \$17.50 (72). In one instance the steamship *Kate* was compelled to pay \$20.20 (84). At times the prices fluctuated on certain days to the extent of \$3 a ton (90). The prices varied even between different piers. A ship at one pier needing only a few tons might find it cheaper to pay \$50 a ton than to move to another pier (91). Prices, at least during a portion of the period, went up and down very rapidly (50).

One of the reasons for high prices was the demand from abroad (60, 73, 88). "Every day we were having people coming into our office representing firms on the other side trying to buy coal" (88). Prices began to drop in the fall of 1920. The demand from abroad fell off. France, which from June to September had ordered more than she needed, was now flooded with coal; and at Rotterdam cargoes could not be unloaded because so much coal was on hand (85).

As already indicated, the prices fixed by the fuel administrator for *export* coal between October 31, 1919, and April 1, 1920, was \$4.536. But the price fixed for *domestic* coal was much lower. It was around \$3.50 or \$3.25 (86). There was a difference

of \$1.50 in the price fixed by the fuel administrator for export and domestic coal (64). It is, of course, fair to presume that the prices thus fixed by the fuel administrator were fair and reasonable. And if such prices yielded a fair profit, what is to be said of the profits that must have been realized when coal jumped in August, 1920, to \$16 a ton? Does the Fifth Amendment inexorably demand that, under such circumstances, market value alone *must* control in determining *just* compensation?

IN THIS CONNECTION IT SHOULD BE BORNE IN MIND THAT JUST COMPENSATION MEANS A COMPENSATION THAT IS JUST TO THE PUBLIC AS WELL AS TO THE OWNER.

Garrison v. New York, 21 Wall. 196, 204.

Searl v. School District, 133 U. S. 553, 562.

Bauman v. Ross, 167 U. S. 548, 574.

IT IS INTERESTING TO NOTE THAT IN ENGLAND LEGISLATION HAS BEEN ENACTED AND REGULATIONS PROCLAIMED, AS A RESULT OF WAR CONDITIONS, LAYING DOWN CERTAIN PRINCIPLES TO BE FOLLOWED IN DETERMINING THE AMOUNT OF COMPENSATION AN OWNER IS ENTITLED TO FOR PROPERTY THAT HAS BEEN REQUISITIONED. THE AVOWED OBJECT OF THIS LEGISLATION AND OF THESE REGULATIONS IS TO SECURE JUST COMPENSATION—JUST TO THE PUBLIC AS WELL AS TO THE OWNER—AND IT WILL BE NOTED THAT WHILE MARKET VALUE IS AN ELEMENT TO BE CONSIDERED, IT IS EXPRESSLY PROVIDED THAT IT SHALL NOT BE CONCLUSIVE.

1. On account of the contrast which it affords, attention is first called to the Army Act of 1881 (44

and 45 Vict., c. 58), authorizing the navy and the army to impress carriages, animals, and vessels. Its scope was enlarged by the Army Act of 1914 (4 Geo. 5, c. 26), so as to authorize the requisitioning of food, forage, and stores of all descriptions; and it was further amended by the Army Act of 1915 (5 Geo. 5, c. 26). As thus amended the act provides that if the parties disagree as to the price to be paid, the claimant is authorized to apply to the county court, which is empowered to determine compensation in accordance with a schedule ⁶ which reads as follows:

The amount fixed * * * shall be such amount as appears to the county court judge to be the *fair market value* of the article requisitioned on the day on which it was required to be furnished as between a willing buyer and a willing seller. * * *

2. By order No. 1699,⁷ The Defence of the Realm, November 28, 1914, general authority is given (Regulation 2), to do any act involving interference with the rights of property which is necessary for the defence of the realm. Regulation No. 7 of this order reads in part:

The Admiralty or Army Council may by order require the occupier of any factory or workshop * * * to place at their disposal the whole or any part of the output of the factory or workshop * * * ; and

⁶ Chitty's Annual Statutes, 1915, p. 655.

⁷ Statutory Rules and Orders, 1914, vol. 1, p. 510.

the occupier of the factory or workshop shall be entitled to receive in respect thereof such price as, in default of agreement, *may be decided to be reasonable having regard to the circumstances of the case* by the arbitration of a judge of the High Court selected by the Lord Chief Justice of England in England, by a judge of the Court of Session selected by the Lord President of the Court of Session in Scotland, or by a judge of the High Court of Ireland selected by the Lord Chief Justice of Ireland in Ireland.

This regulation was amended in 1916⁸ by adding (*inter alia*):

In determining such price regard *need not be had to the market price*, but shall be had to the cost of production of the output so requisitioned and to the rate of profit usually earned in respect of the output of such factory or workshop before the war, and to any other circumstances of the case.

3. Order No. 190, February 23, 1917, Regulation 2B⁹, which deals with the compensation to be paid for articles requisitioned by the Admiralty, or Army Council, or Minister of Munitions, or the Food Controller,¹⁰ reads in part as follows:

Where any goods, possession of which has been so taken, are acquired by the Admiralty

⁸ Statutory Rules and Orders, 1916, vol. 1, p. 222.

⁹ Statutory Rules and Orders, 1917, p. 270.

¹⁰ The Food Controller was included in Order No. 190 by virtue of Order No. 656, June 28, 1917, Statutory Rules and Orders, 1917, p. 296.

or Army Council or the Minister of Munitions, the price to be paid in respect thereof shall, in default of agreement, be determined by the tribunal by which claims for compensation under the regulations are, in the absence of any express provision to the contrary, determined.

In determining such price regard *need not be had to the market price*, but shall be had—

(a) if the goods are acquired from the grower or producer thereof, to the cost of production and to the rate of profit usually earned by him in respect of similar goods before the war and to whether such rate of profit was unreasonable or excessive, and to any other circumstances of the case;

(b) if the goods are acquired from any person other than the grower or producer thereof, to the price paid by such person for the goods and to whether such price was unreasonable or excessive, and to the rate of profit usually earned in respect of the sale of similar goods before the war, and to whether such rate or profit was unreasonable or excessive, and to any other circumstances of the case; so, however, that if the person from whom the goods are acquired himself acquired the goods otherwise than in the usual course of his business, no allowance, or an allowance at a reduced rate, on account of profit shall be made.

4. Order No. 1190, November 16, 1917, Regulation 2jj,¹¹ which gives authority to the board of

¹¹ Statutory Rules and Orders, 1917, pp. 322, 323.

trade to requisition any horse or horse-drawn vehicle, provides that in default of agreement compensation is to be determined by an arbitrator in accordance with rules which read:

Such compensation shall be paid for any horse or horse-drawn vehicle so taken possession of as shall, in default of agreement, be determined by the arbitration of a single arbitrator appointed in manner provided by an order of the Board of Trade; but in determining the amount of the compensation the arbitrator shall have regard to the age and condition of the horse or vehicle, to the allowance of a reasonable profit on the price, if any, paid by the person from whom the same is taken, and to any other circumstance *without necessarily taking into consideration the market price at the time.*

5. Order No. 5, January 10, 1917, Regulation 2f(2),¹² which authorizes the Food Controller to requisition food supplies, provides as follows with respect to compensation:

Such compensation shall be paid for any article or stock so requisitioned as shall, in default of agreement, be determined by the arbitration of a single arbitrator appointed in manner provided by the order; but in determining the amount of the compensation the arbitrator shall have regard to the cost of production of the article and to the allowance of a reasonable profit, *without necessarily taking*

¹² Statutory Rules and Orders, 1917, p. 247.

*into consideration the market price of the article at the time.*¹³

6. The last act to be mentioned is the Indemnity Act, 1920 (10 & 11 Geo. 5, c. 48),¹⁴ the nature of which is indicated by its title: "An Act to restrict the taking of legal proceedings in respect of certain acts and matters done during the war, and provide in certain cases remedies in substitution therefor, and to validate certain proclamations, orders, licences, ordinances, and other laws issued, made, and passed, and sentences, judgments, and orders of certain courts given and made during the war."

The act provides that in certain designated cases compensation is to be made in accordance with the schedule annexed thereto. Part I of this schedule reads:

¹³ The meaning of this regulation was under consideration by the Court of Appeal in *Danish Bacon Co. v. Ministry of Food*, 38 The Times Law Reports, 507, March 23, 1922. In reporting the oral utterances of Lord Justice Bankes, the reporter says: "That regulation, so far as it referred to compensation, appeared to him [the Lord Justice] to have been drafted from the point of view that, having regard to the extraordinary state of things existing in the country at the time, *the disorganization of trade and the scarcity of various articles of food, market prices, where there were market prices, were no longer an indication of the real value of the goods in the sense of the value to the person to whom compensation was to be paid.* The market prices might be much too high or much too low. Therefore a particular form of words had been adopted in order to arrive at a formula which should be a guide to an arbitrator and give him a full discretion in endeavoring to arrive at what should be a fair measure of compensation. * * * His Lordship then read the clause as to compensation in Regulation 2F and said that those words seemed to provide that the arbitrator must have regard to, that was to say, must not disregard, the cost of production and the allowance of a reasonable profit, but that subject to that he was to have a free hand to consider what was the fair and reasonable amount of compensation and *not necessarily to be bound by the market price of the article.*"

¹⁴ Chitty's Annual Statutes, 1920, p. 835.

The payment or compensation to be awarded for the use of a ship, or vessel, or cargo space, or passenger accommodation therein, and for services rendered shall be based on the rates and conditions contained in the Blue Book reports, or in cases of a class where those rates and conditions have not been applied on some other liberal estimate of the profits which the owner could have made if there had been no war, and shall be assessed *without taking into account any increase of market values* of tonnage or of rates of hire due to the war, together with, in cases where damage to or loss of the ship or vessel directly due to such use has occurred, a sum by way of compensation in respect of such loss or damage, so, however, that nothing shall be awarded for any other damage or loss incidentally caused to the owner or to other persons.¹⁵

The validity and interpretation of these various legislative acts and regulations have been frequently before the courts.

¹⁵ In speaking of this portion of the Indemnity Act, 1920, Scott & Hildesley, in their book on "The Case of Requisition," say, at p. 165: "How the courts will in such cases interpret the direction that regard is to be had to the war and to all other relevant circumstances, it is not easy to forecast. In the case of ships, however, and still more in the case of chattels the position is even more obscure. According to the decision in *Newcastle Breweries (Ltd.) v. The King*, (1920), 1 K. B. 854 [the case has since been overruled], the right to compensation for goods requisitioned for the Navy or Army is a statutory right, the compensation being assessable on the basis of the fair market value. But for this measure there is now substituted the principle of assessment upon the basis of cost, together with an allowance for profit at the rate usually earned before the war, as provided by Defence of the Realm Regulation 2B."

(H. of L.) *Attorney General v. Royal Mail Steam Packet Co.*, [1922] 2 A. C. 279.

(H. of L.) *Attorney General v. DeKeyser's Hotel*, [1920] A. C. 508.

(C. of A.) *Elliott Steam Tug. Co. v. Shipping Controller*, [1922] 1 K. B. 127.

(C. of A.) *John Robinson & Co. v. The King*, [1921] 2 K. B. 183.

(C. of A.) *Danish Bacon Co. v. Ministry of Food*, *supra*.

(C. of A.) *A & B Taxis, Ltd., v. Secretary of State for Air*, [1922] 2 K. B. 328.

Newcastle Breweries, Ltd., v. The King, [1920] 1 K. B. 854 (later overruled).

Brooke v. The King, [1921] 2 K. B. 110.

IF IN ANSWER TO WHAT HAS JUST BEEN SAID THE CONTENTION IS MADE THAT PARLIAMENT IS UNFETTERED BY ANY CONSTITUTIONAL RESTRAINTS AND THEREFORE MAY CONFISCATE AT ITS WILL THE PROPERTY OF THE CITIZEN, THE REPLY IS THAT THE PRINCIPLE OF ALLOWING JUST COMPENSATION FOR PRIVATE PROPERTY TAKEN FOR PUBLIC USES IS AS DEEPLY IMBEDDED IN ENGLISH AS IN AMERICAN LAW.

This matter was set at rest by the unanimous decision of the House of Lords on May 10, 1920.

Attorney General v. De Keyser's Hotel, [1920] A. C. 508.

The syllabus reads in part:

The Crown is not entitled as of right, either by virtue of its prerogative or under any statute, to take possession of the land or buildings of a subject for administrative

purposes in connection with the defence of the realm without paying compensation for their use and occupation.

The various opinions that were rendered contain an interesting historical review of the authorities covering many centuries.

A comment on this case in 33 Harvard Law Review, 714, reads in part:

At all events, the constitutional significance of the court's struggle to bring the statutes and regulations into harmony with English tradition and English ideas of fair play is brought out by the fact that the result finally reached is in the spirit of our Fifth Amendment: "Nor shall private property be taken for public use without just compensation."

IF IT SHOULD BE SUGGESTED THAT THESE ENGLISH ACTS AND REGULATIONS INDICATE THAT IN THEIR ABSENCE MARKET VALUE WOULD BE CONTROLLING AND THEREFORE DISCLOSE THE NECESSITY OF LEGISLATIVE INTERFERENCE IN ORDER TO CHANGE THE CUSTOMARY METHOD OF DETERMINING COMPENSATION, THE REPLY IS THAT SUCH AN INFERENCE IS ALTOGETHER INADMISSIBLE.

It will be noted that the first statute that was passed, the amendatory act of 1915, prescribed that the measure of compensation should be the *fair market value*. The later acts and regulations which have been cited prescribe in effect that in determining compensation market prices, while they may be considered, shall *not necessarily be controlling*.

These later acts and regulations accordingly give no basis for the inference that in their absence market prices would control. If that were so, then the passage of the amendatory act of 1915, which prescribed fair market value as the basis of determining compensation, would give rise to the inference that if that act had never been passed, the courts would have adopted an entirely different test.

The essential thing to be borne in mind is that these acts and regulations, in prescribing the principles to be followed in determining compensation, merely evince an intention on the part of the law-making body to do justice—justice to the owner as well as to the public. When the act of 1915 was passed Parliament evidently thought that justice was to be obtained by giving the owner whose goods were taken compensation as measured by fair market value. But conditions became radically changed as the war progressed. It then became universally recognized that if market value should alone control, a glaring injustice might be done the public, which would be compelled to pay for articles requisitioned for war purposes out of all proportion to what the owner was in justice entitled to.

The fundamental aim of all courts is to administer even-handed justice. And if this court is convinced that the application of the market value rule in determining the compensation to be paid for the coal in question will result, as we think it will, in a

gross injustice to the public, it ought not to hesitate to apply a different principle which will be eminently fair to the plaintiff and the public alike.

Of course, if the dictum ¹⁶ in *Monongahela Nav. Co. v. United States*, 148 U. S. 312, is allowed to stand, it is obvious that the government must look to the courts, and to the courts alone, for relief against an oppressive rule of damages totally unsuited to the circumstances which this record discloses.

IT IS TO BE NOTED THAT IN THE VARIOUS STATUTES ENACTED BY CONGRESS AUTHORIZING REQUISITIONING AND PRESCRIBING COMPENSATION, MENTION IS NEVER MADE OF MARKET VALUE AS A BASIS FOR COMPENSATION. IN FACT, IN THE ONLY INSTANCE WHERE THAT TERM IS EMPLOYED, CONGRESS EXPRESSLY DIRECTS THAT MARKET VALUE SHALL NOT BE CONTROLLING.

"Fair actual value *based upon normal conditions* at the time of taking . . . or . . . the fair charter value *under normal conditions* for such period," to be paid by the United States. (Shipping Board Act, 39 Stat. 731.)

Secretary of Navy authorized, through a board of survey, to ascertain "the actual value" of a belligerent vessel taken by the United States. Findings of the board to be "competent evidence in all proceed-

¹⁶ It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even *what shall be the rule of compensation*. (See criticism of this dictum in an earlier part of the brief.)

ings of any claim for compensation." (German Boat Resolution, 40 Stat. 75.)

President authorized to acquire North Island in San Diego harbor for aviation purposes, the condemnation proceedings to be conducted in accordance with California law. Upon final ascertainment of "the value," the amount shall be paid into court. (Special Aviation Act, 40 Stat. 247.)

"Fair and just" compensation for military supplies, arms, and ammunition, and for rental for plants taken possession of by the President for the manufacture of such articles. (National Defense Act, 39 Stat. 213.)

"Just and reasonable rates" shall be fixed by the Interstate Commerce Commission for priority car service, same to be paid by the Secretary of the Treasury for government service. (Priority Ship-ment Act, 40 Stat. 273.)

"Just compensation" to be determined by the President and paid by the United States, for any factory, mine, or plant requisitioned for the production of necessities. (Food Control Act, 40 Stat. 280.)

"Just compensation" fixed by the President or by the Federal Trade Commission for coal and coke plants requisitioned. (Food Control Act, 40 Stat. 284.)

"Just compensation" shall be determined and paid by the President for commandeered distilled spirits. (Food Control Act, 40 Stat. 282.)

"Just compensation" to be ascertained and paid by the President for foods, feeds, fuel, and other supplies for the army and navy, or any other public use connected with the common defense. (Food Control Act, 40 Stat. 279.)

"Just compensation" to be paid by the United States for ships and materials. (Emergency Shipping Fund Act, 40 Stat. 182.)

"Just compensation" to be paid by the United States for ships and war materials. (Naval Emergency Fund Act, 39 Stat. 1193.)

"Reasonable price" to be determined by the Secretary of War, for arms, ammunitions, supplies, and equipment. (National Defense Act, 39 Stat. 213.)

"Reasonable price" for ships and war material ordered. (Naval Emergency Fund Act, 39 Stat. 1193.)

Railroads taken over by the government "shall receive as just compensation an annual sum * * * not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June 30, 1917." If the President, for designated reasons, shall find this basis of compensation "so exceptional as to make the basis of earnings hereinabove provided for plainly inequitable as a fair measure of just compensation, then the President may make with the carrier such agreement for such amount as just compensation as under the circumstances of the particular case he shall find just." (40 Stat. 451.)

IT IS ALSO SIGNIFICANT THAT IN THE VARIOUS STATUTES PASSED DURING THE REVOLUTIONARY WAR, NONE CAN BE FOUND WHICH PRESCRIBE MARKET VALUE AS THE TEST TO BE EMPLOYED IN DETERMINING THE VALUE OF REQUISITIONED ARTICLES. THESE STATUTES ARE OF IMPORTANCE IN DETERMINING THE MEANING OF "JUST COMPENSATION" AS USED IN THE FIFTH AMENDMENT.

The various colonial statutes are collected in Clark's Emergency Legislation, pp. 228 to 989. Virginia, for example, in 1781, enacted this significant statute:

Whereas great abuses have happened and may happen both in the inequality of the prices and the exorbitancy of the sums at which provisions to be impressed for the use of the army shall be appraised; *Be it therefore enacted*, That so much of the laws heretofore in force or which have passed during the present session of assembly, as relate to the valuation of any provisions so impressed, are hereby repealed, and in lieu thereof, *It is enacted*, That the governor and council be empowered to fix from time to time a *reasonable* price in specie for all of the said articles, etc. (Clark's E. L., 984.)

Connecticut, in 1778, enacted this statute dealing with the prices to be paid for certain requisitioned articles:

That all woolen cloths, blankets, linens, shoes, stockings, hats, and other articles of clothing suitable for the Army, heretofore imported, which are or shall be seized and

taken by order of authority, for the use of the Army, shall be estimated at the rate of one dollar continental currency for each shilling sterling, prime cost of such goods in *Europe*, with the addition of the stated allowance for land carriage, if any there be, to the place where taken; and in case the prime cost of any goods imported from foreign parts can not be ascertained, the same shall be estimated by the judgment of two skilful, judicious, and disinterested men, under oath. (Clark, E. L. 235.)

Pennsylvania, in 1778, enacted a somewhat similar statute. After reciting that "Whereas notwithstanding the large quantities of clothing which have been seasonably ordered from Europe for the armies of the United States of America, adequate supplies have not yet been imported," and after making provision for the appointment of commissioners with power to collect, seize, and take designated articles for the use of the army, goes on to provide:

That the owner or owners of the goods, wares, and merchandise before enumerated, and other articles of clothing, shall exhibit and deliver to the commissioner seizing such goods, wares, merchandise, and clothing a true account on oath or affirmation of the *original prices which they cost him* and of the incidental charges thereupon. And the commissioner aforesaid shall appoint four honest, judicious, and reputable housekeepers of the neighborhood, who may add thereto any sum they may think *reasonable* for the advancing the money for and the care and trouble of such owner

about such goods, so as the same do not exceed twenty per cent thereupon. (Clark, E. L., 717.)

It can not of course be controverted that these colonial statutes may be examined for the purpose of throwing light on the meaning of the Constitution.

The Selective Draft Law Cases, 245 U. S. 366.

Pollock v. Farmers Loan & Trust Co., 157 U. S. 429.

Rhode Island v. Massachusetts, 12 Pet. 657.

THE PRINCIPLE WE CONTEND FOR FINDS SUPPORT IN THE RULINGS OF THE COURTS AS TO THE MEASURE OF DAMAGES TO BE APPLIED WHERE HOUSEHOLD GOODS OR ARTICLES OF PERSONAL WEAR ARE CONVERTED. SUCH GOODS ARE BOUGHT AND SOLD AT SECOND-HAND STORES, AND IT THEREFORE CAN IN TRUTH BE SAID THAT THEY HAVE A MARKET VALUE. BUT THE INJUSTICE OF APPLYING MARKET VALUES UNDER THESE CIRCUMSTANCES IS OF COURSE APPARENT.

Household goods which were stored at the defendant's warehouse were converted. The court, in commenting on the rule of damages, said that the *market value* of the goods was *not* the test, but the value to the owner based on his actual money loss was the true measure.

Lake v. Dye, [1921] 232 N. Y. 209.

A valuable foot note on this case in 22 *Columbia Law Review*, 455, reads in part:

In this field of the law, damages are intended only as compensation, i. e., an amount

sufficient to put the injured person in as good a position as if the act had not been done. If the property has a market value, the awarding of the price as damages is intended to enable the injured party to purchase goods identical in nature with the property converted, and thus put himself in the same position. But it is frequently true, as in the instant case, that the market price would not be a reliable means of determining what damages would so compensate. The second-hand value of household goods, for example, is so far below the cost price of new goods that the owner, who perhaps can not use or will not buy secondhand goods, is not fully compensated by the market price. On the other hand, to give him the cost price of new goods does not take into consideration the depreciation due to the use of the goods, and is, therefore, not a correct measure of his loss. Or, even where the market price is ordinarily used as a base for estimating damages, as in the case of a contract to sell a chattel, where the damages are the difference between the market price and the contract price, the market price may in a particular instance be unduly inflated, and therefore, if used as a conclusive measure, would operate to give one of the parties an undue advantage. Or, as frequently happens, the property may have no market value at all, as in the case of family portraits, or a set of building plans. In these cases the market price clearly can not be utilized to determine what sum will compensate the plaintiff. In the last analysis,

therefore, market price is nothing more than evidence of the amount to which the injured person is entitled. If such evidence does not, for any reason, correctly indicate what amount will compensate, there should be no hesitancy in discarding it; this the courts have done.

The principle we contend for is also illustrated by *Suburban Land Co. v. Arlington*, 219 Mass. 539. It was held that "boom" prices were not proper to be considered in determining the value of lots sought to be condemned, the court saying:

And, as a test of value, we are not inclined to say that the price which is established artificially and temporarily by booming methods should be regarded as equivalent to the market value which is regulated by the natural laws of supply and demand.

It is worth while in this connection to call attention to a ruling of Attorney General E. R. Hoar in 1869. A company owned a turnpike in Kentucky, over which, during the rebellion, large numbers of horses, mules, and wagons belonging to the United States, employed in transporting military supplies, were driven; and for this use of the road the company was allowed and paid by the War Department one-half of the rates of toll as established by the laws of the state. The turnpike company, however, claimed that it was entitled to full rates of toll—a claim not unlike that which the plaintiff now makes in this case. The Attorney General ruled that the use of the turnpike was not a taking of property within the constitutional sense, and that its owner

was in no different position from the owner of land on which a battle is actually fought. But upon the hypothesis that the owner was entitled to just compensation, the Attorney General discussed the measure of recovery in these words:

If the company is entitled to full compensation, it is only entitled to such an amount of money as will compensate it for the whole use of the road from 1861 to 1865, which is to be determined by the whole amount of damage suffered by the company, and *not by any legislation of the State of Kentucky*, which has fixed tolls which may be just for ordinary travel but greatly more than is necessary for full compensation to the company when the road is used for the transportation of the supplies of a large army. 13 Op. Atty. Gen. 112.

WE THINK THAT THE PRINCIPLES LAID DOWN IN THE FOLLOWING CASES SUPPORT OUR POSITION.

Kountz v. Kirkpatrick, 72 Pa. St. 376.

Johnson-Brinkman, etc., v. Wabash Ry. Co., 64 Mo. App. 590.

See also 2 *Sutherland on Damages* (4th ed.), p. 1438.

THE CONDITIONS DURING THE TIME IN QUESTION WERE SO ABNORMAL THAT IT CAN NOT IN FAIRNESS BE SAID THAT THERE WAS A FREE AND UNRESTRICTED MARKET.

Upon this subject the witnesses were divided. Carpenter for example when asked if the market

was a speculative one replied: "I would not so consider it; the supply and demand caused the market price" (60). He later repeated the same thing (65). He added that one of the reasons for high prices was the demand from abroad (60). He denied that the congestion of ships at Hampton Roads and other places was a contributing factor, saying that "The congestion of ships was caused by the congestion of railroad transportation." And when asked whether the longer the ship waited the higher the demurrage was, he answered: "I presume that they accrued the demurrage;" also adding that this might have been one of the factors for high prices, although he thought that prices were predicated more on railroad transportation (60). "The capacity of the mines was far beyond the car supply. They could have produced twice as much coal as the car supply would permit" (61). In answer to the court he said that supply and demand plus transportation determined the market (61). As showing how coal producers took advantage of the necessities of European buyers during this critical period, this question and answer is full of significance:

Q. What was the difference between the price of spot coal in the month of May, export, and, what do you call it—inland rail market?

A. Yes; I will answer that question by saying that the domestic consumers, suppliers, generally, did not charge their trade, their old trade, more than a reasonable—I would not

say a reasonable price but a *much lower price than we were getting for export* (64).

Moon, on the contrary, said that transportation had nothing to do with the extremely high prices prevailing in August, 1920. "Transportation to Hampton Roads in the month of August was normal, or a little better than normal, from the tonnage figures" (73). It was the strong demand for export coal that increased the price (73).

Routten thought that there was a shortage of coal in August, 1920 (87). When asked whether the amount of coal that might be used for the trade was subject to restrictions, he replied: "Yes; about that time there was a certain percentage from each pier had to go coastwise; I think *as high as twenty-two per cent from certain sources*. Of course, that included the New River pools 1 and 2; it included all the pools" (88). When asked if this did not necessarily affect the prices for export coal, he answered: "Well, it *naturally limited the supply*, and simultaneously with that was the demand on the other side, which was about at its peak, because there were so many buyers in this country. Every day we were having people coming into our office representing firms on the other side trying to buy coal" (88).

When Bryan, the editor of a coal trade journal, was on the witness stand to testify as to market prices, he naively said: "I do not want to pass as a moralist, but if you want to put me on record

I will say that at times *I thought the prices were too high*. We are suffering to-day from high prices. I was paying \$125 for a suit of clothes that I did not want to pay, that I had to pay. * * * I paid \$125 for a suit of clothes in New York, and I went to London and bought this suit that I have on for \$47, which I regard as a better suit" (92).

Whereupon the court took occasion to repeat the views which it tenaciously, and as we think improperly, adhered to at every stage of the trial;

Now, gentlemen, I think with all due respect to the government of the United States, that the fallacy of the position taken is illustrated by the examination of this witness (92).

Coming now to the government's witnesses, Howe, after first explaining his connection with what is known as the Tidewater Coal Exchange, which was an association of shippers and railroads formed under the Council of National Defense and afterwards used by the Fuel Administration as one of its pieces of machinery for distribution (93-4), said that he was appointed as an agent of the Interstate Commerce Commission on June 24, 1920, to administer service order No. 6 (94). When asked what this was, he replied: "That was an order restricting the delivery of coals in an effort to furnish New England with a proper supply of coal and *restricted the exportation until a proper supply had been furnished*" (95). This order, he said, was superseded on August 2 by service order No. 11, which continued in

effect until September 17, 1920 (95). He went on to say "that the restrictions from October 1 to March 1 placed by the so-called central coal committee under the terms of the direction of the Fuel Administrator *prohibited the exportation of coal except such coal as was produced in excess of domestic needs*" (97). When asked what were the restrictions after the ban of the Fuel Administration was lifted, he said: "During the months of March and April the restriction on exportation of coal was placed in the hands of four gentlemen who undertook to carry out practically the same idea and *only allowed surplus coal to be exported*" (97). This, he said, tended to keep a larger supply for domestic use and in this way the market price for *domestic* coal was kept down. But no attempt, he said, was made to keep the price of *export* coal down; "no consideration of the appraisal of export coal was given at all" (97). When asked what other restrictions there were, he said: "Then the restriction under the Interstate Commerce order No. 6, of June 24, which had to do with furnishing the cars for loading coal. The carriers were directed not to furnish cars to any man for any purpose * * * other than domestic until all domestic orders had been fulfilled. That order did not accomplish quite what they thought it would, and it was modified on August 2, or effective August 2, by service order No. 11, in which it was estimated what the New England territory needed in particular, and a definite percentage of the coal produced in each district was furnished the railroads which *must be fur-*

nished to New England by tidewater" (97, 98). When asked if these restrictions affected the price of coal for export at Hampton Roads, he answered "only in so far as it made coal less available" (98). No restrictions, he said, were placed "except as to the limitation of quantity" (98).

During the time these restrictions were placed on the quantity of coal to be exported, he said that there was a considerable congestion of vessels "in Hampton Roads as well as other ports awaiting coal, and there was a considerable shortage of coal as we viewed it. During the first period we did have a miners' strike, which I think lasted from November 1 to December 12, 1919; which was followed by a severe winter, interrupting transportation conditions. That made *it necessary to continue the restrictions as long as the weather continued*. Then that was followed by the railroad labor strikes, the switchmen's strike, which brought us up to another shortage, the demand being constantly greater than we could supply on the export coal" (98). All of these things, he said in answer to the court, tended to increase the price of export coal. When asked if the transportation facilities were normal in August, 1920, and whether the supply of coal was normal at Hampton Roads, he said that he could not answer inasmuch as he was not in charge of Hampton Roads that month, but "from that territory serving Baltimore we were in fairly good condition from a transportation standpoint in August, though we *still had the restrictions and trying*

to get sufficient coal to New England" (99). He said, in answer to the court, that there was always a demand for export coal at Hampton Roads "and some sort of a supply," but the prices fluctuated according to whether the demand was greater on one day or another, and that supply and demand were the controlling factors (99). When asked what he meant by supply and demand, he replied: "Vessels calling for the amount of coal that was there or calling in for an excessive amount of coal more than they were able to furnish them" (100). He added that coal was very high during this period and that this "was common knowledge." The price began to decrease the latter part of September when the supply was getting greater than the demand; "the exports fell off very materially about that time" (100).

When Commander Cobey was on the witness stand the government offered to prove by him (*inter alia*) that the market at Hampton Roads "was a purely speculative market and did not in any way represent the reasonable value of the article itself." The government also offered to prove that in February, 1919, the plaintiff furnished figures showing that in 1918 its average cost of producing coal was only \$2.79 (104). But the court sustained an objection (105), under an understanding that the government should have an exception (103). The facts stated in the offer of proof must, however, for the purposes of this record, be taken as true; and the cost of \$2.79 in 1918 is sufficiently close to the period in question to justify a presumption that this figure continued

to represent the cost. The fact therefore that this company, which was able to produce coal at only \$2.79, was nevertheless able to get as high as \$16 a ton, serves forcibly to accentuate the government's contention that the market was *not a free and fair market*, and accordingly ought not to control.

The court, however, as its various rulings indicate (85, 86, 109, 115, 120), thought that so long as there was a market, it made no difference whether the market was a fair and free one.

The court finally turned to government counsel and inquired: "Now, has the government any proof that there was not a market?" (109). Thereupon the government proceeded to interrogate Commander Cobey upon this subject, when the court, somewhat impatiently, proceeded to question the witness:

Q. Is there a market for coal at Hampton Roads?

A. There is a free market now; yes, sir.

Q. There was a market all along, was there not?

A. A restricted market existed.

Q. What restricted it?

A. The restrictions on the spot market was principally the very small quantity of coal that was at hand as compared with the demand.

Q. Is not that always a restriction where the supply is low and the demand is great?

A. Yes.

Q. The coal was bought and sold, was it not, at Hampton Roads during all this period?

A. Well, irregularly.

Q. But it was bought and sold during the entire period, was it not?

A. It was, but not in the same way that coal is ordinarily bought and sold.

Q. Not in the same manner as it had been, but it was bought and sold during that period, was it not; that is, the period of the coal in suit?

A. Well, it was, of course, bought and sold, but there were many times when there were no sales.

Q. Because there was no coal?

A. Yes.

Q. But when it was bought and sold it was bought and sold in a market, was it not?

A. Yes.

Q. And when it was not sold it was because a supply was not there?

A. That, and, your honor, I was going to say the restrictions of the various governmental agencies regarding transportation to New England and the Great Lakes, as I believe was testified to yesterday.

Q. They affected the supply, did they not?

A. They affected the supply; yes, and the distribution (113, 114).

The court proceeded to interrogate the witness as shown at pages 116-118. He testified that he had no reason to doubt that the individual sales mentioned by the plaintiff's witnesses were in fact made. At page 120 he said: "Markets did exist during that whole period but at times during that period there was no market." A disagreement arose as to what the witness really meant. The court took him in

hand again, and the witness reiterated that spot coal was bought and sold at Hampton Roads except when there was no available supply. He then proceeded to explain the causes for this lack of supply: "The causes were that the coal was already covered by contract, the principal cause; there was very little free coal because of the shortage of production. The shortage of production was due to the railroad conditions primarily, and during that time, the month of November and the latter part of October, 1919, there was a very serious miners' strike and the switchmen's strike in April, and the orders of the Interstate Commerce Commission to divert coal inland to the Great Lakes, and the hard winter of 1919-1920, all of those caused the supply of free coal to be very limited" (123).

The court then continued its examination:

Q. Where men testify here that there was a market price on certain days, was there anything in their testimony which would lead you to believe that the prices which they named were not market prices?

A. Yes.

Q. Can you fix any dates which were given with the amounts of prices testified to which, in your judgment, were not the market prices for coal on those days?

A. I could not state that, in our opinion, any of these very high prices were the market prices.

Q. Annexed to the complaint is a schedule showing the dates when coal was taken, show-

ing the fair market value as the plaintiff has testified to it here in court. Have you examined those schedules?

A. Yes.

Q. Now, in what particulars, what precise statements made in those schedules are incorrect?

A. In that they do not represent what the petition calls for, a fair market value (123,124).

Whereupon the court, apparently greatly dissatisfied with the answers the witness had given in response to these questions which the court itself had put, made this remarkable ruling, to which the government duly excepted:

You better strike all of this evidence out, every bit of it; it is entirely irrelevant and incompetent (124).

Finally, the witness was asked by government counsel: "In your opinion was there a free market for the sale of coal from September 19th to January 21, 1921, for the grade of coal involved in this suit?" But the court would not let the witness answer, the government again excepting (124).

IN THIS CONNECTION THE FACT SHOULD NOT BE OVERLOOKED THAT ALTHOUGH THE ARMISTICE HAD BEEN SIGNED, THE COUNTRY WAS, IN A SENSE, STILL AT WAR DURING THE PERIOD IN QUESTION, WITH ALL THE VIOLENT DISTURBANCES OF THE MARKETS WHICH WAR INEVITABLY PRODUCES.

Hamilton v. Kentucky Distilleries Co., 251 U. S. 146.

Ruppert v. Caffey, 251 U. S. 264.

INASMUCH AS THE DEFENDANT IN ERROR CLAIMS THAT THE GOVERNMENT'S CONTENTIONS HAVE BEEN REPUDIATED BY DIFFERENT FEDERAL COURTS, WE PRODUCE THE VARIOUS FEDERAL CASES DEALING WITH THE AMOUNT OF COMPENSATION TO BE PAID FOR ARTICLES REQUISITIONED UNDER THE LEVER ACT.

National City Bank v. United States, 275 Fed. 855; aff., 281 Fed. 754 (coffee).

C. G. Blake Co. v. United States, 275 Fed. 861 (coal).

Our second main proposition is that even if we are wrong in maintaining, under the circumstances disclosed by this record, that market prices are not controlling, the court nevertheless committed error in refusing to admit evidence as to domestic market prices and in holding that spot export market prices alone control.

A SHORT REVIEW OF SOME OF THE TESTIMONY IS FIRST NECESSARY TO A FULL UNDERSTANDING OF THIS SUBJECT MATTER.

Carpenter testified that the coal which the government requisitioned was all intended by his company for export or for bunkers, and this was the reason why his company was claiming the export as distinguished from the domestic prices (38, 43, 44, 48, 59, 66, 68). His company could have sold, he said, all the coal for export (43, 44, 66, 68). This testimony, we may add, was uncontradicted *except* as it may have been contradicted or explained by other testimony which this witness himself gave and which we shall now notice.

He said that his company was engaged *principally* in the export business, and during the period in question exported 551,000 tons (38). The coal in question, he added, that was shipped to Hampton Roads, was intended for export and bunkers (38). The reason he claims the export price rather than the domestic is because his company was in those days engaged in the export business (43). "That was the business we were engaged in; *we had no other business*" (50).

His company produced about 1,000,000 tons a year from the four mines which it owns (46). Having, as we have just seen, testified that his company was engaged exclusively in the export business, it is somewhat singular that Carpenter should testify that his company had three contracts for domestic business (51) amounting to 3,000 tons a month (52). "The balance was coal sold inland, sold at a time when there was an irregularity in transportation and was sold on the market" (52). Then comes this significant testimony:

Q. And necessarily the irregularity of transportation caused an irregularity in the market, did it not?

A. No, sir; not in the case of the inland, because we had not advanced the prices on our customers inland for obvious reasons.

Q. You only advanced the price on the export trade?

A. Correct; because we wanted their money (52).

His company was selling about 907,000 tons a year, 610,000 of which went into the export trade (52-3). Of the 907,000 tons about 36 per cent was contract coal and about 33 per cent spot coal (53). In other words, about 600,000 tons were exported or furnished for bunkers under either spot or contract arrangements (58). "As I said to you before, there was 33 per cent spot, about 36 per cent of contract, export and bunkers, and that would leave about 31 per cent coastwise and inland" (59).

It will thus be seen that there is remarkable confusion, if not, indeed, outright inconsistency, in the witness's testimony. At one place he says that his company was engaged exclusively in the export business, and the reason he is seeking to collect export prices from the government is because all of this coal could have been sold as spot in the export trade. At another place he says that 30 per cent of his company's annual production was used in the domestic business—coastwise and inland. Of the balance, all of which went into the export and bunker trade, 36 per cent was contract coal and 33 per cent noncontract coal.

At this juncture we now turn to Carpenter's definition of contract and spot coal. Spot coal is a tidewater term and means coal that can be demanded within three or four days; in other words, for almost immediate delivery (35). Contract coal, on the other hand, is coal contracted for in advance, delivery to be made in designated amounts throughout the life of the contract (35). April is

the month when these contracts for domestic coal are usually entered into, but this is not true of contracts for bunker or export coal (51). By bunker coal is meant coal intended for a ship's bunker (47). The ship is usually a foreign vessel, although not infrequently ships belonging to our own merchant marine are included in the term (48-9). Dr. Garfield said that bunker coal for foreign vessels should be considered as export coal, and he also ruled that bunker coal for American vessels going to foreign ports should likewise be treated as export coal (68).

The sporadic and uncertain supply of spot coal is indicated by this important testimony which Carpenter gave:

Q. When these shipments were made to Hampton Roads, Mr. Carpenter, did you have charterers in all cases ready for reshipment or not?

A. I would like to explain this, that a coal producer usually making these contracts figures on what the car supply is going to be. Well, if it so happens he gets a larger supply than he figured on he will have some free coal. In another case we sell coal on a certain contract. The steamer is located to arrive on a certain day in a certain month. By storms it is delayed on its route and it may be seven days late. Well, a cargo is at the port provided and by a seven days' delay in the vessel you have time to reship from the mines, consequently you sell the coal in order to relieve

the cars and take advantage of the spot market.

Q. *And those were the spot sales you mentioned?*

A. *Yes, sir* (67).

It will be seen from this that when the coal in question was shipped by the plaintiff from its mines, it was then not known whether it would later become spot coal or not. That depended altogether on unforeseen contingencies. The coal was shipped in the first instance because of the plaintiff's contracts to sell coal for future delivery. If, on the coal's arrival at Hampton Roads, it should be ascertained that the vessel for which it was intended was not there to receive it, the coal would be sold in the spot trade, provided there was sufficient time to send the cars back to the mine for reloading and reshipment by the time the vessel was expected to arrive. Or if it should happen that the company got a larger car supply than it anticipated, it would avail itself of the surplus for shipping what is designated as free coal in contradistinction to contract coal. It would therefore appear that the testimony which this witness gave to the effect that *all* the coal which the government requisitioned would have been sold in the market as *spot* coal is not true, or at the best is true only in part.

Commander Cobey testified that of the total amount of coal distributed at Hampton Roads only 10 to 20 per cent represents spot coal (114). This testimony was uncontradicted.

THE DIFFERENCE IN THE PRICE OF EXPORT AND DOMESTIC COAL.

Of the coal that is distributed through Hampton Roads, Carpenter said that the quantity for domestic use, outside of that part which goes to New England, is not great (47). New England paid almost as much as was charged for export and bunker coal (61). When asked the difference between the export and what he designated as the inland all rail market, he replied that the latter was much lower (64). When asked what was the difference between the export and the domestic price, he replied that it varied materially—that it might be as much as \$1.50 (64). The Fuel Administrator fixed a margin between the two of \$1.50 (64). The price which the plaintiff is seeking to recover for the coal taken during the period the Fuel Administrator fixed the price, is the export price (68).

Moon said that there was no difference in prices at Hampton Roads between spot domestic and spot export coal (81), but he later qualified this by saying that what he meant by spot domestic was coal transported by barges to New York, adding that it made no difference in the prices he had to pay whether the coal he bought went abroad or went to New York or New England (82).

Routten said that the price fixed by the Fuel Administrator for export coal was \$4.53, and that for domestic coal was around \$3.25 or \$3.50 (86).

Howe said that in consequence of the restrictions which he spoke of, the market price of coal for domestic use was kept down, but that this was not true of export coal (97).

The government offered to prove that the prices for spot domestic coal were much lower than the prices for spot export (104) but the court would not permit this (105), there being an understanding that the government should have an exception (103). The trial court's views are summed up in these three sentences uttered during the trial: "I think that the purpose of that is to show that the market price for spot coal was at such and such a price and that they are entitled to the price in the best market where their coal could have been sold. In other words, their just compensation is measured by the best price that they can obtain. And so, unless you are controverting the existence of the spot market I do not see that that is an issue." (115).

The government also endeavored to introduce testimony as to the price of contract coal (50-51; 53-58; 103-4) but the court would not permit this to be done.

THE TRIAL COURT WAS WRONG IN REJECTING PROOF
OF THE MARKET VALUE OF DOMESTIC COAL.

The trial court, as we have just seen, took the position that just compensation was to be measured "by the best price" the company could have obtained (115). It is of course important in this connection to bear in mind that the company did *not* in the first

instance ship its coal to Hampton Roads for the purpose of there selling it as spot export coal. On the contrary, it was shipped by the plaintiff in fulfillment of contracts it had already entered into, and the government was not permitted by the court to prove the contract value. The theory of the plaintiff is that because the government disabled it from fulfilling these contracts to the extent that the coal was requisitioned, the government must therefore pay at the export market rate, however much that rate may depart from the contract rates, and notwithstanding the fact that the export market rate is higher than the domestic. The trial court adopted this view, apparently under an entire misconception of the principles announced in *Boom Co. v. Patterson*, 98 U. S. 403.¹⁷

Because there may be two markets, one export and the other domestic, it by no means follows that just compensation demands that the higher market must control. Such a doctrine was in effect repudiated in *Shipping Controller v. The Lloyd Royal Belge (Ltd.)*, 36 The Times Law Reports, 97. There the British government had requisitioned a ship under an agreement to pay its "ascertained value" in the event of nonreturn. The ship was destroyed by enemy action, and the owner, a neutral, was unable to replace it in the British market because of the war restrictions then prevailing. The only place therefore where he could replace it was in a

¹⁷ This case has been limited and explained by *McGovern v. New York*, 229 U. S. 363. See also *New York v. Sage*, 239 U. S. 57.

neutral market, where the cost would have been three times as great as a similar vessel was then worth in the British market. In repudiating his contention that he was entitled to this larger sum, the court said (p. 98):

The ascertained value of the vessel, found to be £111,000, is the utmost the owners would have been able to obtain for her had they been British subjects, and I can not think that they are entitled to get three times as much because they are not British subjects. In effect, the owners claim a very large sum of money, not because it is the ascertained value of the vessel, but because it is the ascertained value of some other vessel—namely, a similar vessel in the neutral market.

The question is not the value of the article for a particular use, but the market price; and if there is more than one market price, depending on where the coal is to be used, the jury ought not to be limited to the higher but should be at liberty to consider both. Especially is this true in a case where, as here, the uncontradicted proof shows that only 10 to 20 per cent of the coal handled at Hampton Roads was spot export coal.

This principle is exemplified in *Railroad v. Nichols*, 24 Kan. 242. There the railroad was sued for the killing of a cow, and the question was presented whether its value should be determined by its market value for breeding purposes or its market value for beef. It was held that its value for all purposes

should be considered, and that it was for the jury to say in the light of all the testimony what its real market value was.

WE SUBMIT THAT THE GOVERNMENT SHOULD HAVE BEEN PERMITTED TO SHOW MARKET VALUE AS DETERMINED BY THE CONTRACT VALUE.

A somewhat similar question arose in *Burr's Ferry, etc. v. Allen*, 149 S. W. (Tex.) 358, which was a suit to recover the value of logs which were lost because of obstructions placed by the defendant in a river down which the logs were being floated. These logs, as the testimony showed, were never sold for cash but always on time; and the question was presented whether this was enough to establish market value. In holding that it was the court said (p. 361):

We think this was a sufficient showing of the market price of logs at Beaumont at that time. The fact that buyers at that time were not paying cash does not show that the logs had no market value, and we think the amount agreed to be paid for the logs by the buyers generally in said market should be taken as their market value at that time.

The admissibility of this testimony is rendered all the clearer when it is borne in mind that the government offered to prove that the plaintiff, prior to the time the coal was actually taken, was given timely notice of when the government would need the commodity, thereby avoiding any interference with the plaintiff's normal operations (104).

TO SAY THAT THE HIGHER PRICE ALONE CONTROLS IS TO RUN COUNTER TO THE WELL ESTABLISHED RULE THAT WHERE A STOCK OF GOODS IS CONVERTED, THE MEASURE OF RECOVERY IS THE WHOLESALE AND NOT THE RETAIL VALUE.

1 *Sedgwick on Damages* (9th ed.) §248a.

TO SAY THAT THE EXPORT PRICE IS THE SOLE TEST OF VALUE IS TO LOSE SIGHT OF THE VERY PRINCIPLE UNDERLYING THE RULE GOVERNING THE ADMISSIBILITY IN EVIDENCE OF MARKET VALUES.

The very purpose of introducing evidence of market value is because it reflects what the public thinks is the value of the given article. Accordingly, if the American public place a value upon coal as represented by what they are willing to pay for it in the market for domestic consumption, the value thus fixed certainly affords *some* evidence of what the coal is really worth. Assuredly the value which the American people are willing to pay for coal for their own needs affords a much safer guide in determining what is just compensation than the price which Europe is compelled to pay in our markets in order to obtain temporary relief from the unfortunate conditions which the war brought about.

It may not be the only evidence which should be introduced to enable the jury to render a just verdict. But we respectfully submit that to exclude it from the jury's consideration altogether on the theory that it has no probative value in determining what is just compensation, is wholly unwarranted.

IT IS NO ANSWER TO THIS TO SAY THAT IF THE COAL HAD NOT BEEN REQUISITIONED THE OWNER COULD HAVE OBTAINED THE SPOT EXPORT PRICE, AND THAT JUSTICE ACCORDINGLY DEMANDS THAT THE PLAINTIFF SHOULD BE PUT IN THE SAME POSITION IT WOULD HAVE BEEN IN IF THE GOVERNMENT HAD NOT SEIZED THE COAL.

In the first place it is not true, as we have heretofore pointed out, that the owner intended to sell this coal in the spot export market. It is true that Carpenter testified that this coal when shipped from the mines to Hampton Roads was intended for *export and bunkers* (38), but nowhere throughout the entire record does it appear that the coal was intended for the *spot export market*, unless in those exceptional instances where the carrier happened on some particular occasion to furnish cars in excess of what had been ordered. On the contrary, as we have heretofore pointed out, it was shipped in the first instance for the primary purpose of fulfilling contracts for the export and bunker trade; and whether it would ever become free coal available for disposition in the spot export market depended altogether on adventitious circumstances.

But entirely aside from this, the law does not, in assessing damages, aim to put the owner in *exactly* the position he would have been in if no interference with his property had taken place. Thus, for example, if A converts the property of B worth in the market only \$100, B can not recover of A \$200 because C

was under a contract to take the property from B at the latter figure.

Woonsocket M. & P. Co. v. N. Y., N. H. & H. R. Co., 239 Mass. 211.

Cf. Williams Bros. v. Agius, Ltd., [1914] A. C. 511.

IN ANY EVENT THE COURT WAS ALTOGETHER WRONG, WE RESPECTFULLY SUBMIT, IN HOLDING THAT DURING THE PERIOD THE PRICES FIXED BY THE FUEL ADMINISTRATION PREVAILED, THE GOVERNMENT MUST PAY ACCORDING TO THE EXPORT AND NOT ACCORDING TO THE DOMESTIC PRICE.

As we have already seen, the Fuel Administrator fixed the price of export coal at \$4.536 (42). The price, however, fixed for domestic coal was \$1.50 lower (64); or in other words, about \$3.25 or \$3.50 per ton (86). Dr. Garfield ruled that bunker coal for foreign vessels should be considered as export coal, and also ruled that bunker coal for American vessels going to foreign ports should likewise be treated as export coal (68). Assuredly it can not be said that the Navy's vessels fall within this rule. Even if it could be said that vessels belonging to the Navy, if destined for foreign ports, fell within Dr. Garfield's ruling, no proof upon this subject was ever introduced.¹⁸

¹⁸ Singularly enough, Dr. Garfield's order of February 25, 1918, exempts in explicit terms naval vessels from export prices: "5. The phrase 'delivered * * * to vessels for foreign bunkering purposes,' mentioned above, is hereby held to mean coal put in the bunkers of any vessel sailing from a tidewater port for any port outside the United States and Alaska, *excepting naval vessels or Army transports.*" General Orders, Regulations, and Rulings of the United States Fuel Administration, Government Printing Office, 1920, p. 177. When the Fuel Administration was reestablished on October 30, 1919, all regulations, including the one just mentioned, were restored. See appendix to the publication just mentioned, p. 23.

It accordingly seems to us that it is little short of an outrage to say that the government, although it fixed, through the Fuel Administration, a price for domestic coal at \$1.50 per ton lower than for export, must, nevertheless, with respect to its own vessels avowedly maintained for defensive purposes, pay the export price. In all candor we do not see how such a position can be defended. And yet that is just what the plaintiff is attempting to do, as indicated by this interesting passage from the record (43):

Mr. Williams:

Q. Now just explain to the court and jury why you fixed the price at \$4.536, which I understand is the export price.

A. The \$3.08 plus the freight rate of \$2 made \$5.08, and plus \$1.50—let me see; I will have to get a pencil to figure that out.

By the Court:

Q. You took the export price because that was the highest price that you could sell your coal for, was it not; that is, after the government fixed its price it fixed a price for domestic use and it fixed a price for export use?

A. Yes.

Q. And you could have sold your coal for export use and the export price was higher than the domestic price?

A. Yes.

Q. So you set the higher market price, which was the export price; that is the reason for it, is it not?

A. Yes.

The judgment, it is respectfully submitted, should be reversed.

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FEBRUARY, 1923.



FILED

MAR 6 1923

WM. R. STANSBURY
CLERK

No. 316.

**In the
Supreme Court of the United States**

OCTOBER TERM, 1922.

THE UNITED STATES OF AMERICA, PLAINTIFF IN
ERROR,

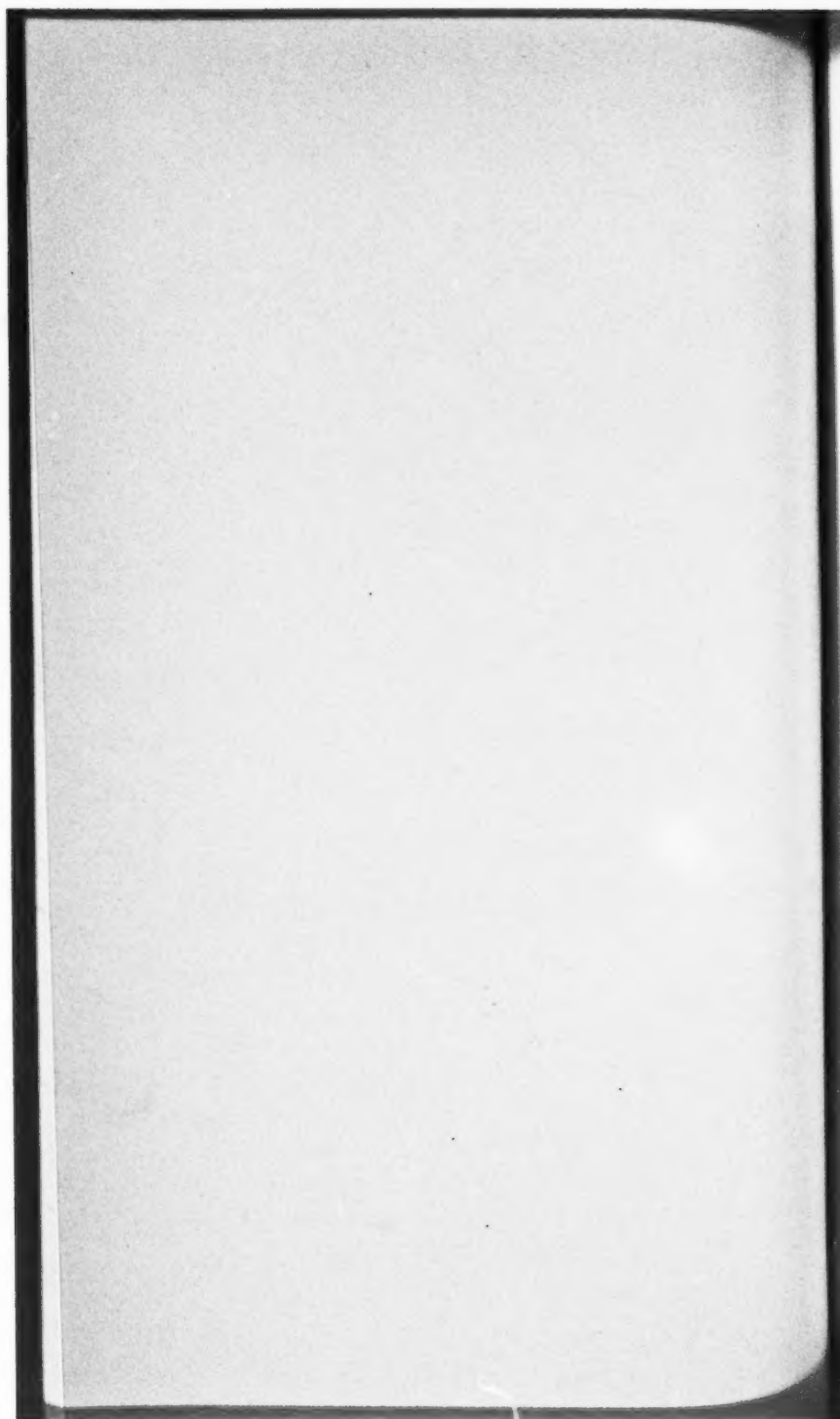
v.

NEW RIVER COLLIERIES COMPANY.

*IN ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE THIRD CIRCUIT.*

**BRIEF FOR NEW RIVER COLLIERIES COMPANY,
DEFENDANT IN ERROR.**

International, 276 Chestnut St., Philadelphia.



IN THE
Supreme Court of the United States.

October Term, 1922. No. 316.

THE UNITED STATES OF AMERICA,
Plaintiff-in-Error,
v.

NEW RIVER COLLIERIES COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF
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BRIEF FOR NEW RIVER COLLIERIES COM-
PANY, DEFENDANT-IN-ERROR.

COUNTER-STATEMENT OF THE CASE.

This appeal is from a judgment of the Circuit Court of Appeals for the Third Circuit (276 Fed. 690), affirming a judgment of the United States District Court for New Jersey, entered upon the verdict of a jury, in three suits brought by New River Collieries Company, a New Jersey corporation, against the United States, to recover just compensation for property owned by it and commandeered by the Navy Department of United States, for its use, pursuant to authority granted by Act of Congress (known as the Lever Act) approved August 10, 1917, c. 53, 40 Stat.

276 (U. S. Comp. Stat. 1918 Sec. 3115 $\frac{1}{8}$ ii). Jurisdiction is conferred by Section 10 of the act on the United States District Courts to hear and determine claims for just compensation for property taken by the Government in the exercise of its power of requisition under that act. The three actions involving the same issue were consolidated for purpose of trial.

The property taken was bituminous coal, and was requisitioned at Newport News and Sewall's Point, Hampton Roads, Virginia, in various amounts, and at different times during the period commencing September 18, 1919, and ending February 1, 1921.

There is no dispute as to the quantity, quality or ownership of the property, or of the fact that it was actually delivered to and used by the Navy Department.

The Navy Department determined prices to be paid for said coal. These prices were refused by defendant-in-error as not being just compensation, and these actions were thereupon brought to recover just compensation.

There were two markets for said coal, *viz.*, a domestic market and an export market, the latter of which was higher. The business of defendant-in-error was chiefly in the export market, and the coal taken was intended for, and would readily have been disposed of in, the export market.

During the period when the property of defendant-in-error was taken there were sold in the open market approximately 36,000,000 tons of coal of the character in question. Defendant-in-error produced

about 907,000 tons, of which about 610,000 tons were sold by it in the export market.

At the trial, the defendant-in-error proved, by men of integrity and of long experience in the coal industry, and especially familiar with market prices for bituminous coal during the period in question, that numerous transactions of purchase and sale took place during such period, that there was a free and open market, that they were familiar with the market prices, stating them.

Defendant-in-error showed its own sales during the period in question to the extent of about 907,000 tons, and a schedule showing prices actually obtained therefor, which corroborated the prices claimed in this suit, and they were admitted in evidence without objection by the Government.

Excerpts from trade journals, including *The Black Diamond*, *Saward's Journal* and the *Coal Trade Journal*, were proved and these prices were all confirmatory of the market price set up by defendant-in-error.

The witnesses called by the defendant admitted that there was a market at Hampton Roads.

Plaintiff-in-error attempted to prove the cost of producing coal of the kind in question, plus a profit which it regarded as reasonable thereon, and this was ruled out by the trial judge.

The jury found verdicts upon the evidence of the market values, though the verdicts were lower than the market values set up by defendant-in-error and lower than the market prices testified to by any of the witnesses. Judgments were entered on the verdicts.

ARGUMENT.

The requirement of Section 10 of the Lever Act, *supra* (by authority of which the property in question was taken), that

“The President shall ascertain and pay a just compensation therefor,”

is obviously in obedience to the mandate of the Fifth Amendment to the Constitution:

“Nor shall private property be taken for a public use without just compensation.”

That the guaranties of the Fifth Amendment are not suspended in time of war, is settled by

Ex parte Milligan, 71 U. S., at p. 520, and
U. S. v. Cohen Grocery Co., 255 U. S. 88
(1921).

And it is likewise not open to question that the measure of just compensation is a matter for judicial, and not legislative or executive, determination:

“The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is *judicial*. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be

paid, and the ascertainment of that is a *judicial inquiry*."

Monongahela Navigation Co. v. U. S., 148
U. S. 312, at p. 327 (1892).

And so, the prices arbitrarily fixed by the Navy Department in this case as compensation for the coal taken from defendant-in-error, have no binding force; and Congress recognizes the principle in its provision in Section 10 of the Lever Act for a judicial determination of just compensation at the instance of the property owner.

The answer invariably given by the courts, both Federal and State, to this question as to the proper measure of just compensation under the Constitution, is that

"The compensation must be a full and perfect equivalent."

Monongahela Navigation Co. v. U. S., *supra*,

and that the owner is compensated

"when he is paid its fair market value for all available uses and purposes."

U. S. v. Chandler Dunbar Co., 229 U. S.
53, at p. 81 (1912).

This principle that "just compensation" is the fair market value of the property at the time and place of delivery, has been so repeatedly stated and affirmed and reaffirmed that citation of all the authorities would be but a vain show of learning and wholly superfluous. Citation of some of the more important authorities,

with brief and forcible excerpts therefrom, are quoted in an appendix hereto (pp. 24 to 31, inc.).

The Government, in its brief, goes far afield in its reference to statutes passed in England and in America in colonial times. The Government must concede, however, that the absence of constitutional inhibitions in England and in America in colonial times, makes the reference far-fetched and utterly destroys the analogy. And even were it otherwise, the doctrine attempted to be inferred by the statutes cited is directly in the teeth of the principle steadfastly adhered to and uniformly applied by this court, to the effect that there cannot be **"a full and just equivalent unless the plaintiff receives from the Government as much as it might have received for its property in the open market."**

The comment of counsel for the Government on page 20 of its brief that the "principle of allowing just compensation for private property taken for public uses, is as deeply imbedded in English as in American law" is not borne out by the authority cited. In the course of the opinion of the House of Lords in *Attorney General v. De Keyser's Hotel*, upon which the Government relies, Lord Dunnedin (the ranking law Lord) says:

"The King, as *suprema potestas* endowed with the right and duty of protecting the Realm, is for the purpose of the defence of the realm in times of danger entitled to take any man's property . . . the texts give no certain sound as to whether this right to take is accompanied by an obligation to make compensation to him whose property is taken. . . . There is a universal

practice of payment resting on bargain before 1708, and on statutory power and provision after 1708. . . . **I do not think that from this usage of payment there can be imposed on the Crown a customary obligation to pay.** . . . On the other hand, I think it is admissible to consider the statutes in the light of the admitted custom to pay, for, in the face of a custom of payment, it is not surprising that there should be **consent on the part of the Crown that this branch of the prerogative should be regulated by statute.**"

It may be conceded that the ascertainment of the fair market value may in certain cases be attended with some difficulty. The few authorities relied on by the Government are isolated, sporadic cases, some involving measure of damage in breach of contract, where under exceptional and special circumstances the market prices have been held not to be the sole evidence of fair value. Much depends upon the nature of the property taken; whether realty or personalty; if realty, whether taken as an entirety or in part; if personalty, whether the article is one which is readily saleable and freely traded in, etc., etc. In none of the exceptional cases cited by the Government was there present an actual active market.

But the present case is entirely free from any such difficulty. For, as the Circuit Court of Appeals, in its opinion below (Transcript, p. 172), so clearly points out:

"If, further, the commodity be a staple, which, like coal, is produced for sale and consumption, not for retention and long use, the difficulty is again reduced, for in such instance the first—

and sometimes the last—inquiry to be made in reckoning its value is its worth as an article of sale. If it be an article commonly traded in on a market and it is shown that at the time and place it was taken there was a market in which like articles in volume were openly bought and sold, the prices current in such a market will be regarded as its fair market value and likewise the measure of just compensation for its requisition.”

And may we not safely rest upon the finding made by the learned Circuit Court of Appeals below, from its review of the evidence (Transcript, p. 171), that

“The plaintiff introduced evidence which, *not being disputed*, proved that at the place and during the time the Government took the plaintiff’s coal there were two markets for coal, a domestic market and an export market, the latter being the higher; that both markets were affected by war conditions still prevailing and by Government restrictions still in force, *though in both markets supply and demand were the controlling factors*; that the business of the plaintiff was chiefly in the export trade; that the export demand during the time and at the place in question was such that, but for the action of the Government in requisitioning its coal, it could have sold its coal for export at prices prevailing for spot deliveries.”

And so the jury found.

And to foreclose any possibility of doubt as to the correctness of this finding of fact, we refer to the testimony (Transcript, p. 33), that approximately 36,000,000 tons of this kind of coal was sold in the open

market, during said period defendant-in-error producing and selling 907,000 tons (Transcript, p. 52), of which latter about 610,000 tons were sold in the export market (Transcript, p. 53), and of which 268,000 tons were sold "spot" at Hampton Roads (Transcript, p. 59). Five expert witnesses for the defendant-in-error, three wholly disinterested and all unimpeached, testified that there was always a market—an eager, constant and ready demand which would have absorbed at once all of the coal of defendant-in-error (Transcript, pp. 32 to 92). And two of the Government's witnesses, in answer to the inquiry of the learned trial Judge as to the existence or non-existence of a market, testified that there was a market for this coal (Transcript, pp. 96, 113, 114). At pages 96 and 97 of the Transcript we find the following from the testimony of Joseph A. Howe, a Government witness:

"By THE COURT:

Q. There was a market down there at Hampton Roads, was there not?

A. Yes.

Q. Coal was bought and sold down there, was it not?

A. Yes.

Q. And prices were paid by buyers for coal and sellers received prices for it?

A. Yes.

Q. And there were a number of dealers there?

A. Yes.

Q. During all this period?

A. Yes.

Q. And the prices varied from day to day, did they not?

A. I am informed they did.

Q. To the best of your knowledge?

A. To the best of my knowledge.

Q. And they fluctuated?

A. Yes."

Again, at page 99, this same witness was asked:

"By THE COURT:

Q. There was no trouble about there being a market down there at Hampton Roads for export coal?

A. There was always a demand.

Q. And supply?

A. Some sort of a supply.

Q. And the prices fluctuated according as to whether the demand was greater on one day or another?

A. Yes.

Q. Supply and demand were the controlling factors?

A. Yes."

The statement prepared by the witness Carpenter and introduced in evidence is particularly enlightening. It is set forth in the appendix hereto, page 33.

The Government, however, advances the argument that "the conditions during the time in question were so abnormal that it cannot be said that there was a free market." But the only circumstances pointed out by the witnesses for the Government in this connection (besides the fact that the prices were high) were the regulations of the Interstate Commerce Commission with respect to "furnishing cars for loading coal," limiting the number thereof, and restricting the quan-

tity of coal for exportation. They were obliged to concede, however, that these regulations merely affected the supply (Transcript, p. 98), and that they did not destroy or restrict the market, but that on the contrary there was an actual market for spot coal for export or bunker purposes and active and regular trading therein during the entire period here in question. See excerpt from testimony quoted *supra*, page 8, *et seq.*

Prices of nearly all commodities were high because of the law of supply and demand and because of the effect thereon of post-war conditions. There was no suggestion that conditions at Hampton Roads were different in any respect from the general conditions throughout the United States.

It is apparent, then, that the finding of the Circuit Court of Appeals in this case (Transcript, p. 172) is a complete answer to the Government's contention:

"Admittedly, the coal market at Hampton Roads was affected by war conditions and Government restrictions. The market there was abnormal in the sense of being different from the market before the war. While war did produce a condition where the demand greatly exceeded the supply, it was not a condition prevailing on particular days at the particular place at which the Government requisitioned the plaintiff's coal, *but was a general condition prevailing wherever coal was bought and sold.* War did not destroy the coal market; it made a market of another kind, which, though abnormal in comparison with the peace market, was firmly established and long continued. The prices at which coal was regularly sold and bought in such a market under its vicissitudes constituted, we think, valid evidence of its fair market value."

Of equal force and clarity is the answer made to a similar contention by Judge Peck in an analogous case:

“The abnormalities of the market on which the Government relies to set aside the ordinary rule and invoke the exception are of two classes—these resulting from governmental regulation and those consequent upon unusual commercial conditions following the hostilities accompanying a technical state of war.

“The fact that laws and governmental regulations affect the sale of commodities does not abrogate the settled rule that market value is just compensation. All transactions in the commercial world are more or less affected by such conditions. Tariffs, transportation regulations, and various legal restraints and restrictions are in constant operation. Neither does the fact that unusual conditions affect the market mean that there is no market or market price. Droughts, floods, commercial panics, crop failures, labor difficulties and other causes frequently affect markets seriously, but not so as to warrant a Court, when assessing compensation consequent upon the exercise of the right of eminent domain, in saying there is no market. **The effects of war may differ in degree, but so long as a market, that is, a general buying and selling of the commodity, exists, the rule persists.**”

The C. G. Blake Co. v. U. S., 275 Fed. 861, 863 (1922).

The Government suggests the payment of “cost and a reasonable profit” irrespective of what the owner is able to get for his property in the ordinary course of barter and sale. But this standard of compensation is vague and impracticable of application. Would the Gov-

ernment then pay different prices to different producers for the same products at the same spot? Since costs vary, if the Government pays a uniform "cost and a reasonable profit" on some theory evolved out of the air, then some producers will either be making no profit, or a greater or less profit than other producers. It requires no special knowledge of economics to realize that certain producers are capable of more economical production than others and that it is necessary that there should be a demand at a price in excess of the cost of the most economical producer in order to bring out the volume of production. Would different prices be paid to producer and middleman? And why further strain the judicial system by requiring a determination of what is a "reasonable profit," when we have now the direct and simple standard of fair market value? And would the rule be the same when the market was depressed? Why afford the possibility of discrimination amongst citizens by taking the property of one at so-called "cost plus a reasonable profit," and allowing others, more favored perhaps by the officials having the power of requisition, to dispose of their property in the open market and to receive the full market value thereof.

In the award of the Tribunal of Arbitration, composed of the Hon. Chandler P. Anderson, Arbitrator American-British Claims Arbitration Tribunal (appointed by the United States), His Excellency, Mr. Benjamin Vogt, Envoy Extraordinary and Minister Plenipotentiary of his Majesty the King of Norway (appointed by the Government of the Kingdom of Norway), and Mr. James Vallotton, Docteur en droit, member of the bar of Lausanne, Associat of the Institut de Droit International, President of the Tribu-

nal (appointed at the request of the two Governments, by the President of the Swiss Confederation), which was a proceeding between the United States of America and the Kingdom of Norway, to arrive at just compensation for certain property requisitioned by the United States, the Tribunal awarded the *fair market value* of the claimant's property, and in addition thereto it awarded as a part of just compensation a lump sum to each claimant in respect of interest covering the period during which claimant's property was used by the United States.

In *Children's Hospital v. Adkins*, 284 Federal Reporter 613, in an opinion by Van Orsdel, Associate Justice of the Court of Appeals of the District of Columbia, in discussing the constitutionality of the Federal minimum wage law, there appears the following language, which is peculiarly applicable to the position taken by the Government in the case at bar:

"Legislation tending to fix the prices at which private property shall be sold, whether it be a commodity or labor, places a limitation upon the distribution of wealth, and is aimed at the correction of the inequalities of fortune which are inevitable under our form of government, due to personal liberty, and the private ownership of property. These principles are embodied in the Constitution itself, and to interfere with their freedom of operation is to deprive the citizen of his constitutional rights. In other words, regardless of public sentiment or popular demand, such a radical change, if deemed necessary, should not be accomplished by legislative enactment or judicial interpretation, but by way of amendment in the orderly way provided."

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"The police power cannot be employed to level inequalities of fortune. Private property cannot by mere legislative or judicial fiat be taken from one person and delivered to another, which is the logical result of price fixing. As was said by Mr. Justice Pitney, in the *Coppage Case*:

" 'But the Fourteenth Amendment, in declaring that a state shall not "deprive any person of life, liberty or property without due process of law," gives to each of these an equal sanction; it recognizes "liberty" and "property" as coexistent human rights, and debars the states from any unwarranted interference with either. And since a state may not strike them down directly it is clear that it may not do it indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty.' "

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"The tendency of the times to socialize property rights under the subterfuge of police regulation is dangerous, and if continued will prove destructive of our free institutions. It should be remembered that of the three fundamental principles which underlie government, and for which government exists, the protection of life, liberty and property, the chief of these is property; not that any amount of property is more valuable than the life or liberty of the citizen, but the history of civilization proves that, **when the citizen is**

deprived of the free use and enjoyment of his property, anarchy and revolution follow, and life and liberty are without protection.

“The highest freedom consists in obedience to law, and a strict adherence to the limitations of the Constitution. In no way can the freedom of the citizen be more effectively curtailed and ultimately destroyed than by a deprivation of those inherent rights safeguarded by our fundamental law. The security of society depends upon the extent of the protection afforded the individual citizen under the Constitution against the demands and incursions of the Government. The only tyranny the citizenship of this republic need fear is from the government itself. The character and value of government is measured by the security which surrounds the individual in the use and enjoyment of his property. These rights will only remain secure as long as the Bill of Rights—the first ten amendments of the Constitution—are construed liberally in favor of the individual and strictly, against the government. They were early adopted because of a widespread apprehension that the time might come when the government would assume to trespass upon those inalienable individual rights announced in the Declaration of Independence and afterwards incorporated in the Bill of Rights. Courts, therefore, should be slow to lend aid to the government in this modern tendency to invade individual property rights.

“ ‘Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be

liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.' *Boyd v. United States*, 116 U. S., 616, 635, 6 Sup. Ct. 524, 535 (29 L. Ed. 746)."

"Let no one imagine for a moment that our civilization is such that property rights can thus be socialized without the grossest abuse of the privileges granted, or that the restraint of the abuses can be left with safety to legislative or judicial discretion."

The rights of the citizen are well summed up in the language of District Judge Peck:

"How can there be a full and just equivalent unless the plaintiff receives from the Government as much as it might have received from others in the open market for this coal?"

C. G. Blake Co. v. U. S., 275 Fed. 861, 867 (1922).

And where there is, as in this case, an actual market, with numerous transactions in a given staple commodity, the actual market price in such market is the best and only evidence of value, either in ascertaining just compensation or in determining the measure of contractual right and liability as between citizens. As has been well remarked, the individual who has prop-

erty which is taken for public use should not be required to make a greater contribution to the public welfare than other citizens; in rejecting the theory of "cost plus a reasonable profit" advanced by the Government in a similar matter, *Gulf Refining Co. v. The United States*, Petition No. 34,120, decided June 12, 1922, the Court of Claims said, per Chief Justice Campbell:

"It is to be admitted that the exigencies of war may render it more or less difficult to ascertain what the just compensation should be, but the existence of a state of war cannot be justly said to suspend the provisions of the Fifth Amendment. The *Cohen Grocery Co. Case*, 255 U. S. 81; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 156. **The same rules are applicable in the ascertainment of values of property taken during a war as are applicable for property taken during times of peace.** As has been suggested, it may be more difficult to find what the market value is, for instance, in times of war than it would be to find what the market value of a commodity is in time of peace, but if there be a market the fact is as controlling in the one time as it is in the other. A war may, and does, enhance prices, and one of its horrors is that it may, by injuring or destroying supplies, produce distress and want, but that does not justify the taking of property of an individual at less value than the individual himself would have to pay to supply its place. The individual having property which is taken for public use is not required to make a greater contribution than other citizens similarly situated to the public good, and all other citizens are expected to bear their part of the general expense. It is not necessary to abandon well-established principles of law in order to

hold the balance even between the citizen and the Government when his property is thus taken. Just compensation is all that can be asked for, and just compensation should be given for property taken in time of war as well as that taken in time of peace. **The value of the property must be arrived at, if possible, and its market value is its true measure of value if that can be determined in the particular case."**

There were in the market so-called spot prices and so-called contract prices for coal. The contract price applies where the buyer obligates himself to take and pay for certain amounts of coal at a given time in the future. There were likewise in this market two different prices for coal, domestic and export.

The Government contends that it should have the benefit of the so-called contract prices for coal, and, further, that evidence as to prices of domestic coal should have been admitted.

Contract prices made presently for future delivery, are wholly irrelevant to the question of present prices for immediate delivery. The Navy did not choose to contract for its requirements as the other Government departments in fact did; it chose to commandeer and to have the advantage of the fluctuations of the market. If the market price had gone down, the Government would then have had the advantage thereof. The coal commandeered by it was for immediate delivery and it was immediately taken and used by the Government; the citizen therefore must be paid what he could have obtained in the open market therefor—and in the best available open market, to wit, the spot export market.

In dismissing the Government's contention that it was entitled to have the value of the property taken determined upon evidence of domestic prices, the Circuit Court of Appeals below applied the principle settled by the decisions; that the owner is entitled to receive as just compensation for his property taken by the Government, the full market and pecuniary value thereof for all available uses and purposes to which it might have been applied and for which it might have been sold at the time of the taking.

Thus, Mr. Justice Lurton, in *U. S. v. Chandler Dunbar Co.*, 229 U. S. 53 (1912), said:

"The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes."

And in *Boom Co. v. Patterson*, 98 U. S. 403, 407 (1878), Mr. Justice Field said:

"The inquiry in such cases must be, what is the property worth in the market, **viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted.**"

There was affirmative testimony in this case, uncontradicted and undisputed, that the claimant herein was engaged primarily in the export business and that the coal which had been taken by the Government was intended for the export market, and that the whole thereof could readily have been disposed of in the export market at the prices here claimed by the defend-

ant-in-error. In the language of the decisions, the property taken by the Government was, without any question of doubt, adapted and available for export and bunker purposes, and the defendant-in-error was therefore justified, in establishing the market value of its coal, "to avail itself of the prices in that market in which, but for the action of the Government it could, and according to the habit of its business probably would, have sold its coal. That was the price in the export market."

We confidently submit that there is in the record overwhelming, uncontroverted and unimpeached testimony of facts establishing a market for spot coal for export or bunkering purposes during the period in question.

The issue tendered by the Government was not one of fact but of constitutional law. *No offer or attempt* was made to *disprove any of the facts* shown so conclusively by defendant-in-error. The utmost that plaintiff-in-error's star witness, Commander Colby, could say was that the trade journals did not show transactions on all the dates in question. (Transcript, p. 116.) The exhibit shows that he was mistaken in this. (Appendix to Paper Book of Defendant-in-error.) The criticism, if it were sound, but it is not, would have been applicable only to a transaction or two. But the absence of other transactions at the particular moment, or even on the day, does not preclude the application of the salutary market value rule. In general there was a market. Five experts in that market testified as to what the market prices were in transactions for immediate delivery. One of these witnesses

sold a million tons for export during the period in question. (Transcript, p. 69.) All were engaged exclusively in the coal trade. Most were engaged exclusively in the export coal trade. In the absence of actual transactions on that particular day, resort could not be had to "cost plus a reasonable profit," but the inquiry would be broadened so as to include the nearest available market plus transportation and so as to take in other sales reasonably near in point of *time*. The inquiry is much simpler than the market price of real estate, which may not have been sold for years and with regard to which it may be difficult to find applicable sales. Yet in regard to real estate in eminent domain cases no Federal Court or Court of any of the forty-eight States has ever found it necessary to tread the "unpathed waters, undreamed shores" of "cost plus a reasonable profit."

The nubbin of the controversy is found in the plaintiff-in-error's seventh request for charge. (Transcript, p. 139.) This requests the Court to charge that the measure of damages is "cost plus a reasonable profit." This was the new gage invented by the Navy and thrown at the feet of an astonished profession and community. The answer to "cost and a reasonable profit" was that it ignored the substance of the duty to pay just compensation as construed by every court; that it would take from the citizen on an arbitrary and conjectural basis his property for which he could instantly have obtained gold dollars in an eager market; and that it affected to set up a standard so difficult, so complicated, so speculative as to swamp the courts and litigants in mazes of interminable ques-

tions of accountancy and fact and mixed law and fact: What is cost? Whose cost? What is a reasonable profit? Whose reasonable profit?

The issue ^{is} of market value versus "cost plus a reasonable profit." The former is a clear and readily understood, easily applied, standard, invoked through generations. It has stood the test of time. The latter is a monstrous suggestion, unknown, untried and incapable of rational application or reasonable certainty.

The evidence offered by the Government was without legal significance and was irrelevant and immaterial to the issue; and the verdict and judgment are amply sustained in fact and in law.

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CHARLES L. GUERIN,
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Of Counsel.

APPENDIX.

1. That "just compensation" means market value for the best use to which the property can be put at the time it is taken, is a well-settled principle of Federal and State jurisprudence of universal application when there is an actual market for the property at the time of the taking.

Monongahela Navigation Co. v. U. S., 148 U. S. 312 (1892);

Five Tracts of Land v. U. S., 101 Fed. 661 (1900);

U. S. v. Inlots, Federal Cases No. 15, 441 (1873);

Spring Valley Waterworks v. Drinkhouse, 92 Cal. 528, 536 (1892);

Boom Co. v. Patterson, 98 U. S. 403 (1878);

U. S. v. Chandler-Dunbar Co., 229 U. S. 53 (1912);

U. S. v. First National Bank, 250 Fed. 299 (1918);

City of New York v. Sage, 239 U. S. 57 (1915).

All of the above cases were condemnation proceedings instituted by the United States, pursuant to an Act of Congress, where the effort was to ascertain "just compensation," and they uniformly announce the principles contended for by defendant-in-error. Pertinent extracts therefrom are referred to as follows:

In *Five Tracts of Land v. U. S.*, the Circuit Court of Appeals for the Third Circuit, per Gray, J., ap-

proving the charge of the Court below on the correct measure of "just compensation," in which was discussed, *inter alia*, a claim of the owners to the "historic value" of the property, as follows, page 665:

"There is no doubt that historic association may enter into the market value of land, but you are not to give, as separate items, first, market value; and, second, historic value. If you did that, you would depart from what I have said to you the *law has established as the measure of just compensation, which is market value*. But, as I said to counsel during the course of the cause, if a piece of land has in the market a value because there are trees upon it, a value because there are stones upon it, a value because it may be used to raise cereals, a value for any other physical peculiarity of the property, if it also has in the market a value based upon its historical associations, that as much enters into *market value* as would a mine opened upon the property, or a well dug upon it. It is a part of the different matters that go to contribute to the sum total of *market value*. Just in that way you are entitled to consider historic value, if you believe from the evidence that *market value* is at all enhanced by historic value. . . . Nor, *keeping your minds always to market value*, you are to consider the valuation with reference to the necessities of the Government of the United States to take the property, or the particular purposes to which the United States Government proposes to put it. . . . *You are getting at the market value*. Therefore observe, not what the United States might be willing to pay in order to carry out the purpose which it has in view,—that is not the question,—but *what in the market would any purchaser desiring to buy this property be*

willing to give for it, considering all the elements that have been stated, in order to acquire it from a seller willing to sell."

In *U. S. v. Chandler-Dunbar Co.*, Mr. Justice Lurton said, page 81:

"The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes."

In *City of New York v. Sage*, Mr. Justice Lurton also wrote the opinion of the Supreme Court, using the following language, page 61:

"But what the owner is entitled to is the value of the property taken, and that means what it may fairly be believed that a purchaser in fair market conditions would have given for it in fact—not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of its advance due to its union with other lots."

In *Monongahela Navigation Company v. United States*, 148 U. S. 312 (1892), where the Federal Government had condemned for public uses certain property of the company, it was held that the United States must return the exact equivalent for it to the company. Mr. Justice Brewer said, page 325:

"The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the Government, the last, the one in point here, being, 'Nor shall private prop-

erty be taken for public use without just compensation.' The noun 'compensation' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of these two words, be no doubt that the compensation *must be a full and perfect equivalent* for the property taken."

In *United States v. Chandler-Dunbar Co.*, 229 U. S. 53 (1912), Mr. Justice Lurton said, at page 80:

"In a condemnation proceeding, the value of the property to the Government for its particular use is not a criterion. The owner must be compensated for what is taken from him, but that is done when he is paid its *fair market value for all available uses and purposes.*"

In *Boom Co. v. Patterson*, 98 U. S. 403 (1878), Mr. Justice Field said, at page 407:

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, *what is the property worth in the market,*

viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted."

In *United States v. First National Bank, et al.*, 250 Fed. 299 (1918), where the United States had taken possession of land for a military camp and thereafter began condemnation proceedings, it was held that the owners were entitled to recover as compensation the value of the property at the time of the actual taking. Judge Clayton said, at page 301:

" 'Just compensation' means equitable compensation; that the owner shall be saved harmless as near as may be, and shall recover the damage which he has actually sustained. . . . Fair, reasonable, adequate, just compensation, for the loss or injury the owner may sustain, the Constitution guarantees to the citizen whose property is taken for public uses. . . . The question in these cases relates first to *the value of the lands appropriated which is to be assessed with reference to what it was worth for sale, in view of the uses to which it might have been applied*, and not simply in reference to its productiveness to the owner in the condition in which he saw fit to leave it."

In *Kanakanui v. United States*, 244 Federal 923 (1917), Judge Gilbert said, at page 924:

"The only limit upon the power of the United States to exercise the right of eminent domain is that just compensation shall be made for the property taken. Just compensation means the *full equivalent* for the property taken."

In *United States v. Town of Nahant*, 153 Fed. 520 (1907), where it appeared that the United States, by the Secretary of War, had condemned certain property of the town for Government purposes, it was held (Judge Aldrich delivering the opinion of the Court) as the syllabus reads in part:

“Where the United States in its sovereign capacity exercises its arbitrary power to condemn private property for necessary public use, the just compensation which it is required by the Constitution to make to the owner should be determined on equitable principles, and should be such as to put the owner *in as good condition pecuniarily as he would have been if the property had not been taken.*”

In *Benedict v. New York*, 98 Fed. 789 (1889), Circuit Judge Wallace said, at page 790:

“Just compensation entitles the owner to the *full market or pecuniary value of his property at the time of the taking*, and the authorities are so generally in accord upon this proposition that it may be accepted as the general rule.”

The measure of compensation, where property is condemned for the use of the United States, and the entire property is taken, is the *fair, full market value of the property, in cash*: *U. S. v. Inlots*, Federal Cases No. 15,441 (1873).

“Just compensation,” within the meaning of the compensation to be awarded in condemnation proceedings, means *full compensation for everything or element of value taken*: *Kennebec Water Dist. v. City of*

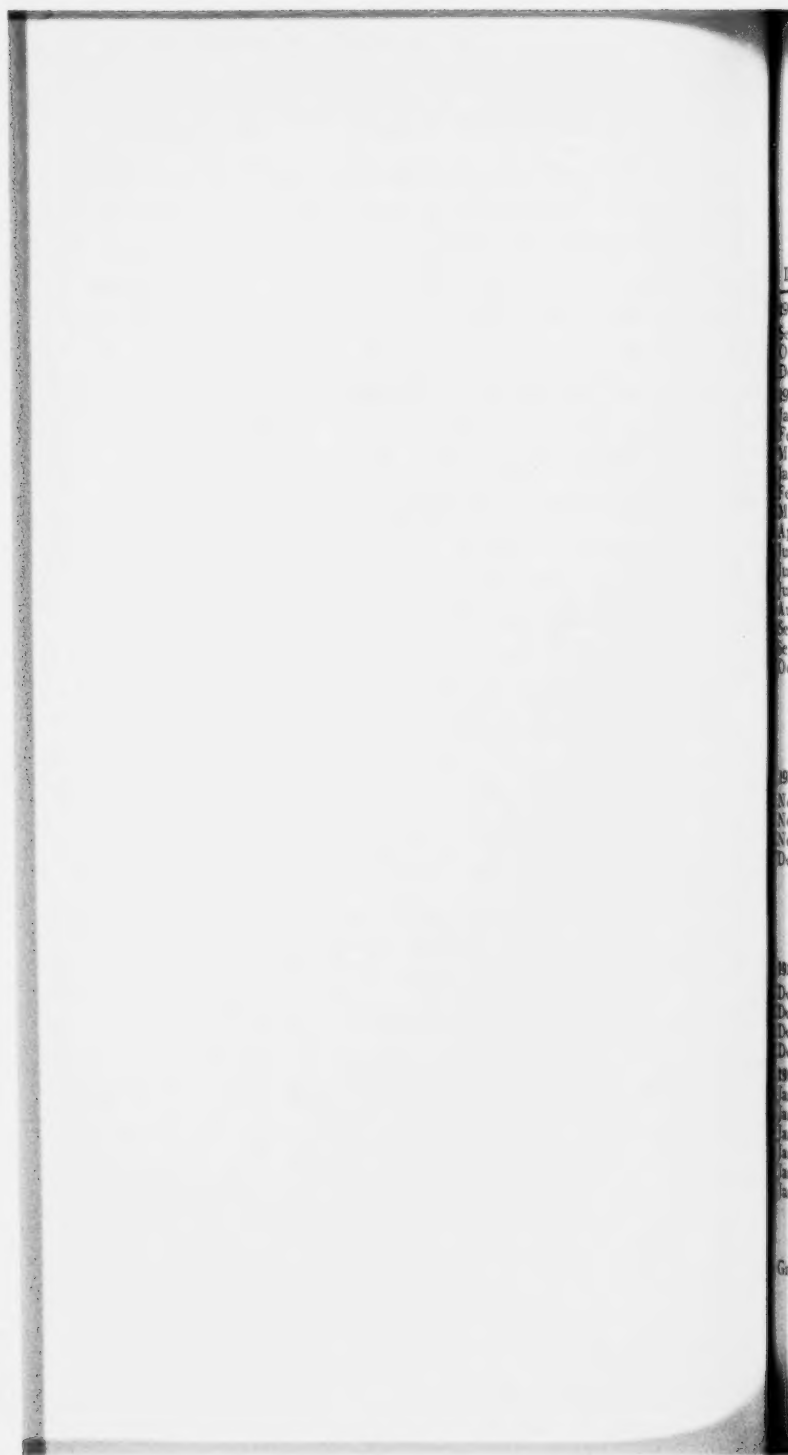
Waterville, 54 Atl. 6, 9; 97 Md. 185; 60 L. R. A. 856 (1903).

“Just compensation,” provided by the Constitution (Art. 1, Sec. 6), as damages for the taking of private property for public use, is to be measured by the *market value* of the property where the whole property is taken: *Brainerd v. State*, 131 N. Y. Sup. 221, 225; 74 Misc. Rep. 100 (1911).

Under Constitution (Art. 13, Sec. 12), declaring that no man's property shall be taken or applied to public use without just compensation being made to him, commissioners appointed to assess the damages for land taken by a railroad company, in fixing the compensation for the land actually taken, must take into their consideration *the market value of the land*, which can always be approximated. This value would be the measure of the compensation guaranteed by the Constitution: *Wilson v. Rockford, R. I. & St. L. R. Co.*, 59 Ill. 273, 275 (1871).

The “*just compensation*” which is guaranteed by the Constitution to the owner whose property is to be taken or damaged for public use is *its market value*, and the market value of land is determined by a consideration of all the uses to which it may be applied, as well as the purposes for which it is adapted. For the purpose of ascertaining this value, it is proper to show its condition and surroundings, the uses to which it has been applied, and its capabilities for other uses, including that for which its condemnation is sought. Its value is not limited either by that of its present use or by the use for which it is sought, since either

of these may be less than its market value. *The owner is entitled to its highest market value for any use to which it is adapted*, and any advantages that the property has, present or prospective, and for which it may be available, constitutes an element in its value which is to be considered by the jury in determining the compensation to be awarded him, and which the owner is entitled to show to the jury by any competent evidence: *Spring Valley Waterworks v. Drinkhouse*, 92 Cal. 528, 536; 28 Pac. 681, 683 (1892).



EXHIB

NEW RIVER COLLIERIES COMPANY VS.

BUREAU OF SUPPLY

Date	In Gross Tons	Invoice Number	Market Prices		Our Spot Sales	Norfolk	
	First Suit		F. O. B. Mines	Amount Sued For		Market For	Nov. 5, 1919
1919	Tons				Order No.		
Sept. 18	8500	5750	\$5.00	\$42,500.00	1527	\$5.00	
Oct. 17	2319	5788	5.00	11,595.00	1553	6.23	
Dec. 1	5000	5903	4.536	22,680.00	1577	4.536	
1920							
Jan. 28	2864	5919	4.536	12,991.10	1607	4.536	
Feb. 2-5	4668.6071	5935	4.536	21,176.80	1613	4.536	
Mar. 23	3500	6075	4.536	15,876.00	1661	4.536	
Jan. 23)							
Feb. 21)	155.2232	6074	4.536	704.09	1651	4.536	
Mar. 4)							
Apr. 23	3170	6076	6.50	20,605.00	1695	6.50	
June 3	3479	6114	11.00	38,269.00	1727	10.42	
June 3	2925	6115	11.00	32,175.00	"	10.42	
June 2	583	6116	11.00	6,413.00	"	10.42	
Aug. 3	4981	6202	16.00	79,696.00	1763	15.94	
Sept. 7	4994	6291	14.70	73,411.80	1788½	15.00	
Sept. 15	1991	6292	13.70	27,276.70	1793	13.86	
Oct. 23	1960	6315	13.70	26,852.00	1829	13.61	\$13.45—\$1
	51089.8303			\$432,221.49			
	Second Suit						
1920	Tons						
Nov. 5	1774	6334	12.20	\$21,642.80	1842	\$12.51	12.70—1
Nov. 23	819	6349	8.45	6,920.55	1858	9.11	
Nov. 25	278	6350	8.45	2,349.10	1862	8.11	7.95—
Dec. 8	1457	6376	6.70	9,761.90	1880	7.05	6.45—
	4328			\$40,674.35			
	Third Suit						
1920	Tons						
Dec. 10	790	6384	5.95	\$4,700.50	1884	6.26	5.95—
Dec. 13	257	6385	5.45	1,400.65	1885	6.20	5.95—
Dec. 14	610	6386	5.45	3,324.50	1889	6.61	
Dec. 16	252	6389	5.45	1,373.40	1892	6.26	570—
1921							
Jan. 6	857	6406	4.70	4,027.90	B-5	5.11	
Jan. 11	406	6411	4.70	1,908.20	B-8	5.11	
Jan. 13	914	6429	4.70	4,295.80	C-3	4.60	
Jan. 14	821	6430	4.70	3,858.70	C-3	4.60	4.45—
Jan. 17	150	6437	4.70	705.00	B-13	4.12	
Jan. 18	252	6440	4.70	1,184.40	B-13	4.12	
	5309			\$26,779.05			
Grand Total	60,726.8303			\$499,674.89			

GOVERNMENT NAVY DEPARTMENT & ACCOUNTS

Black Diamond	Saward's Journal	Coal Trade Journal
9/20—Page 269 \$5.00	9/20—Page 414 \$5.00	None
10/18—Page 349 5.00	10/18—Page 452 5.00	None
Gov't Price	Gov't Price	Gov't Price
Gov't Price	Gov't Price	Gov't Price
Gov't Price	Gov't Price	Gov't Price
Gov't Price	Gov't Price	Gov't Price
4/24—Page 406 6.50	4/24—Page 1008 7.00	None
6/5 —Page 599 11.00	6/5 —Page 108 11.00	6/9 —Page 622 \$10.20
6/5 —Page 599 11.00	6/5 —Page 108 11.00	6/9 —Page 622 10.20
6/5 —Page 599 11.00	6/5 —Page 108 11.00	6/9 —Page 622 10.20
8/7 —Page 132 16.00	8/7 —Page 291 17.20	8/4 —Page 856 17.20
9/11—Page 242 14.70	9/11—Page 402 13.70	9/8 —Page 996 15.20
9/18—Page 266 13.70	9/18—Page 419 12.70	None
	10/23—Page 533 13.20	None
11/13—Page 496 12.20	11/6 —Page 576 12.32	11/10—Page 1254 13.20
11/27—Page 544 11.25	11/20—Page 625 10.20	11/24—Page 1314 7.20
11/27—Page 544 11.25	11/20—Page 625 10.20	12/1 —Page 1344 8.20
12/11—Page 591 6.70	12/4 —Page 673 7.70	12/8 —Page 1372 7.70
12/11—Page 591 6.70	12/11—Page 695 7.70	12/15—Page 1404 7.70
12/18—Page 616 6.20	12/18—Page 721 5.70	12/15—Page 1404 7.70
12/18—Page 616 6.20	12/18—Page 721 5.70	12/15—Page 1404 7.70
12/18—Page 616 6.20	12/18—Page 721 5.70	12/22—Page 1427 5.20
1/15—Page 64 5.20	1/8 —Page 809 5.70	1/5 —Page 10 4.70
1/15—Page 64 5.20	1/15—Page 835 5.15	1/12—Page 41 4.70
1/15—Page 64 5.20	1/15—Page 835 5.15	1/19—Page 67 4.70
1/15—Page 64 5.20	1/15—Page 835 5.15	1/19—Page 67 4.70
1/22—Page 91 4.20	1/22—Page 858 5.00	1/19—Page 67 4.70
1/22—Page 91 4.20	1/22—Page 858 5.00	1/19—Page 67 4.70

Statement of the Case.

UNITED STATES v. NEW RIVER COLLIERIES
COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT.

No. 316. Argued March 7, 8, 1923.—Decided May 21, 1923.

1. Under § 10 of the Lever Act and the Fifth Amendment, the owner of property requisitioned by the United States is entitled to the full money equivalent of the property taken; and the ascertainment of this just compensation is a judicial function. P. 343.
 2. Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation. P. 344.
 3. Evidence of the cost of production, and of what would be a reasonable profit, to the owner, is inadmissible when market prices, prevailing at the time and place of the taking, have been established beyond controversy. P. 344.
 4. Evidence of prices of coal for future delivery current at the time and place of taking, has no weight against market prices then and there current for immediate delivery; nor any tendency to prove what they were. P. 344.
 5. An owner of coal who, at the time and place of its taking by the Government, could clearly have sold it for a higher export market price, and had the right to do so, is not justly compensated by payment of a lower, domestic market price, current there at the same time. P. 345.
- 276 Fed. 690, affirmed.

ERROR to a judgment of the Circuit Court of Appeals which affirmed a judgment for the Collieries Company in the District Court in an action to recover a balance due as compensation for coal requisitioned by the United States.

Mr. Assistant Attorney General Riter, with whom *Mr. Solicitor General Beck*, *Mr. L. L. Hight*, Special Assistant to the Attorney General, and *Mr. R. S. Collins* were on the brief, for the United States.

Mr. Ira Jewell Williams, with whom *Mr. Charles L. Guerin*, *Mr. Yale L. Schekter*, *Mr. F. R. Foraker* and *Mr. Francis Shunk Brown* were on the briefs, for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

On various dates between September 17, 1919, and February 1, 1921, at Hampton Roads, Virginia, the United States requisitioned from defendant in error upwards of 60,000 tons of bituminous coal for use of the Navy. The taking was under § 10 of the Lever Act. 40 Stat. 276. The President, acting through the Navy Department, fixed certain prices as just compensation. These were not satisfactory to the owner. The United States paid 75% of the amount fixed, or, under stipulation of the parties is to be considered as having paid it in accordance with the act. The owner sued in the United States District Court for the District of New Jersey for a sum which added to the 75% would make just compensation. Three actions were consolidated and tried as one. There was no controversy as to the quantity or quality of the coal taken. Judgment was entered in accordance with the verdict of a jury, fixing prices in excess of those allowed by the President. The Government took the case to the Circuit Court of Appeals, and to review its judgment affirming that of the District Court brings the case here on writ of error.

When the coal was taken, there was at Hampton Roads a market for coal for export and also a domestic market. The business of the defendant in error was chiefly in the export trade. During the period in question, it produced about 907,000 tons and sold nearly two-thirds of it for export. Many producers shipped coal there which, with the coal of defendant in error, went into a common pool. There was a strong demand for export coal. There

were many buyers and export prices fluctuated. About 36,000,000 tons were sold in the open market. Supply and demand were controlling factors affecting market prices which prevailed in both the export and domestic markets. The prices for export coal were considerably higher than for domestic coal. If the coal had not been taken by the United States, it could have been sold by the owner at export market prices. The market prices for export coal were shown by a number of witnesses of long experience and familiar with the market, by excerpts from leading trade journals, and by a statement of prices actually received by defendant in error for export coal during that period. On that point the United States offered no opposing evidence. The court held market prices for export coal constituted just compensation, and left to the jury the ascertainment thereof.

The United States contends that the court erred in refusing, under the circumstances disclosed, to allow it to introduce evidence of the "real" value of the coal as distinguished from its market value, and in holding that spot export prices controlled in determining just compensation; and further that, even if such market prices are taken, it was error to exclude evidence of domestic prices.

Section 10 of the Lever Act in obedience to the Fifth Amendment provides for just compensation. The war or the conditions which followed it did not suspend or affect these provisions. *United States v. Cohen Grocery Co.*, 255 U. S. 81, 88.¹ The owner was entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken. *Seaboard Air Line Ry. Co. v. United States*, 261 U. S. 299, and cases cited. The ascertainment of compensation is a

¹ See also *C. G. Blake Co. v. United States*, 275 Fed. 861.

judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard. *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327. Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation. *Vogelstein & Co. v. United States*, decided this day, *ante*, 337; *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 80, 81; *Boom Co. v. Patterson*, 98 U. S. 403, 407. More would be unjust to the United States and less would deny the owner what he is entitled to.

The United States admits that market value is usually the basis for ascertaining the pecuniary equivalent, but suggests that sometimes an article has no market price and that in such case "proof of real value" is admissible and that therefore market value and just compensation are not necessarily synonymous. The court below excluded evidence offered by the United States to show the owner's cost of production and a reasonable profit. This ruling was right, because it was shown beyond controversy that there were market prices prevailing when and where the coal was taken. The United States had the right to take the coal on payment of these prices; the owner was not entitled to more and could not be required to take less. The owner's cost, profit or loss did not tend to prove market price or value at the time of taking, and was therefore immaterial.

The United States offered evidence of prices specified for domestic coal in contracts for future deliveries (current at the time of the taking), as distinguished from prices for spot coal, i. e., coal for immediate delivery. These contract prices were rightly excluded. They could be given no weight as against current market prices, and would have no tendency to prove what such market prices were.

The facts bring this case within the rule stated by the Circuit Court of Appeals (276 Fed. 690, at p. 692):

"If it be an article commonly traded in on a market and it is shown that at the time and place it was taken there was a market in which like articles in volume were openly bought and sold, the prices current in such a market will be regarded as its fair market value and likewise the measure of just compensation for its requisition." The lower courts rightly held that market prices prevailing at the times and place of the taking constitute just compensation.

Nor was it error to exclude evidence of the market prices of coal for domestic use, and to hold that market prices for export coal controlled. The owner cannot be required to suffer pecuniary loss. Upon an examination of the record we agree with the statement of the Circuit Court of Appeals (276 Fed. 690, 691) that if the coal had not been taken by the United States, it could have been sold at the market price for export coal prevailing for spot deliveries at the time of the taking.

The owner was entitled to what it lost by the taking. That loss is measured by the money equivalent of the coal requisitioned. It is shown by the evidence that every day representatives of foreign firms were purchasing, or trying to purchase, export coal. Transactions were numerous and large quantities were sold. Export prices for spot coal were controlled by the supply and demand. These facts indicate a free market. The owner had a right to sell in that market, and it is clear that it could have obtained the prices there prevailing for export coal. It was entitled to these prices.³

The judgment of the Circuit Court of Appeals is affirmed.

³ Cf. *Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 195; *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 326; *Five Tracts of Land v. United States*, 101 Fed. 661, 665; *New York v. Sage*, 239 U. S. 57, 61.